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Supreme Court, U.S.
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DOCKET NO.

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

CONSOLIDATED EDISON COMPANY OF NEW YORK, LONG ISLAND LIGHTING COMPANY, ORANGE AND ROCKLAND UTILITIES, PACIFIC GAS AND ELECTRIC COMPANY, SAN DIEGO GAS AND ELECTRIC COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, CHAMPION INTERNATIONAL CORPORATION, FEDERAL PAPER BOARD COMPANY, INC., INTERNATIONAL PAPER COMPANY, and WEYERHAUSER COMPANY

PETITIONERS

V.

FEDERICO PENA, SECRETARY OF ENERGY and GEORGE B. BREZNAY, DIRECTOR, OFFICE OF HEARINGS AND APPEALS, DEPARTMENT OF ENERGY

and

STATES OF ALABAMA, CALIFORNIA, CONNECTICUT, IDAHO, INDIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, OHIO, SOUTH DAKOTA, VERMONT, WISCONSIN, WYOMING

and

STATES OF DELAWARE, HAWAII, ILLINOIS, KANSAS, NEBRASKA, NEVADA, NORTH CAROLINA, RHODE ISLAND, AND WEST VIRGINIA, TERRITORY OF GUAM AND THE VIRGIN ISLANDS

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where the Department of Energy recovers overcharges by oil companies pursuant to a statute mandating that such recoveries be used for "restitution" to those overcharged and adopts a policy and formula to do so, and then denies such funds to those it has found are entitled to restitution, do the claimants deprived of such refunds have a cause of action against the Department of Energy?

2. Is there a lack of cause of action in the above described circumstances because those overcharged could not themselves have directly sought recovery from the overcharging oil companies under the statutory provision employed by the Department of Energy ?

3. Where the Court of Appeals for the Federal Circuit, acting sua sponte, and inconsistently with its own decisions, found a lack of cause of action in the above-described situation, on the basis of a clear misreading of decisions of this Court, has the Circuit Court so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power?

LIST OF PARTIES AND CORPORATE AFFILIATES

The caption of the case contains the names of all of the parties.

Consolidated Edison Company of New York, Long Island Lighting Company, Orange and Rockland Utilities, International Paper Company, Champion International Corporation, and Weyerhauser Company are all themselves publicly owned corporations and have no parent corporation.

Southern California Edison Company is a wholly owned subsidiary of a publicly held corporation, Edison International Inc.; Pacific Gas & Electric Co. is a wholly owned subsidiary of a publicly held corporation, PG&E Corporation; San Diego Gas & Electric Company is a wholly owned subsidiary of a publicly held corporation, Enova Company; and Federal Paper Board Co. Inc. is a wholly owned subsidiary of International Paper Company.

Orange and Rockland Utilities, San Diego Gas & Electric Company, Southern California Edison Company, and Federal Paper Board Co. Inc. have no nonwholly owned subsidiaries.

Consolidated Edison Company has one nonwholly owned subsidiary, Honeoye Storage Corporation; Long Island Lighting Company has the following nonwholly owned subsidiaries, Marquez Development Corp., LILCO Energy Systems Inc., and Island Energy Services Co., Inc; Pacific Gas & Electric Company has one nonwholly owned subsidiary, Standard Pacific Gas Line Incorporated; Champion International Corporation has the following nonwholly owned subsidiaries, Angelina & Neches River Railroad Co., and Champion Papel eCelulose LTDA; Weyerhauser Company has the following nonwholly owned subsidiaries, Mountain Tree Farm Company, North Pacific Paper Corporation, Pacific Veneer, Ltd., and SCA Weyerhauser Packaging Holding Company Asia Limited; and International Paper Company has the following nonwholly owned subsidiaries, Envases Internacional S.A., Ilford Anitec AB, Impresora del Yacque C por A, International Paper Investment Corporation, International Paper Korea Ltd.,International Paper/TOGA Brasil Ltda, IPI Corporation, Carter Holt Harvey Limited, Shanghai International Paper CNPC Ltd., and Societe Mediterranconne d'Emballages

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CITATION OF REPORTS OF OPINIONS

The Opinion of the Court of Appeals for the Federal Circuit as to which this petition for certiorari is filed is reported as Consolidated Edison Co. of New York et al v. O'Leary et al at 117 F.3d 538 (Fed. Cir. 1997).

The District Court Opinion is not reported officially. It is reported as Consolidated Edison Co. of New York et al v. O'Leary et al at 4 Energy Mgmt. (CCH) par. 26,698.

JURISDICTION

The Judgment sought to be reviewed was entered June 19, 1997.

A timely filed Petition for Rehearing was denied by Order entered August 15, 1997.

Jurisdiction of the Supreme Court is pursuant to 28 U.S.C. Sec. 1254.

STATUTES INVOLVED

The statutes involved, the pertinent text of which is set forth in the appendix are: Economic Stabilization Act Amendments of 1971, Pub. L. 92-210, 85 Stat. 743 (1971), Sections 209-211 (a), Emergency Petroleum Allocation Act of 1973, Pub. L.

93-159, 87 Stat. 27 (1973), Sec. 5(a)(1), Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (1997), Sec.. 502(a), 42 U.S.C. Sec. 7192 (a), Petroleum Overcharge Distribution and Restitution Act of 1986 (PODRA), Pub. L. 99-509, 100 Stat. 1881 (1986) 15 U.S.C. Sec. 4502, Federal Courts Administration Act of 1992, Sec. 102 (a)-(d), 106 Stat. 4506 (1992).

STATEMENT OF THE CASE

This litigation is with regard to the disposition of approximately $2.9 billion in refunds recovered by the U.S. Department of Energy ("DOE") from producers and resellers of crude oil pursuant to a statutory scheme authorizing recoveries for "restitution." (Section 209 of the Economic Stabilization Act Amendments of 1971 ("ESA"), Pub. L. No. 92-210, 85 Stat. 743 (1971).

Specifically, the policy of the DOE which plaintiffs seek to challenge on behalf of 85,000 claimants is diverting from distribution to the claimants some $300 million of refunds which should be paid them in accordance with DOE's own distribution formula.

Plaintiffs have been found by DOE to be entitled to a portion of the DOE-

recovered funds in accordance with a formula promulgated by DOE, as have more than 85,000 others, on the basis of injuries suffered as a result of the overcharges for which refunds were obtained by the DOE. [1]

The basic formula which DOE adopted with regard to distribution of the recovered funds provides an award to each successful claimant of a percentage of the recovered funds equal to the claimant's percentage of purchases of refined

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[1] Because of the volume of their purchases of refined oil products, the ten plaintiffs receive, pursuant to the DOE formula, approximately 14% of the amount distributed to all 85,000 claimants; in the Complaints here, as in their activities during the past decade, plaintiffs seek relief on behalf of all 85,000 claimants. (Actually, the efforts of the six utility plaintiffs here, who receive more than three-quarters of the refunds to all ten plaintiffs, are also on behalf of their millions of electricity customers in New York and California, since, in accordance with a DOE condition of the awards to them, all of the funds they receive are passed through to their customers.)

products by all U.S. purchasers during the regulatory period, 1973-1981. The formula includes in "recovered funds" for calculation purposes certain funds distributed in the litigation in the settlement of which DOE agreed to adopt the policy of claimant restitution. In re The Department of Energy Stripper Well Exemption Litigation, (Stripper Well II), 653 F. Supp. 108 (D. Kan. 1986).[2]

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[2] Prior to the adoption by DOE in the 1986 Stripper Well settlement of the policy of awarding crude oil refunds to claimants, in some settlements DOE (and Congress, by statute in the Warner Amendment, Pub. L. 97-377,Sec. 155, 98 Stat. 1830, 1919 (1982)) distributed crude oil funds to the States (e.g. United States v. Exxon, 773 F. 2d 1240 (TECA 1985), cert. denied 474 U.S. 1105 (1986), or to the United States Treasury (e.g Payne 22 Inc. v. United States, 762 F. 2d 91 (TECA 1985), Cities Service Co v. DOE, 715 F. 2d 572 (TECA 1983). As the Federal Circuit pointed out in Texas American Oil Corporation v. U.S. Department of Energy, 44 F. 3d 1557, 1567 (Fed. Cir. 1995), such distributions were because of the perceived "pragmatic

(continued...)

Implementation of the DOE formula would require that approximately 31-32% of DOE-recovered funds be distributed to the 85,000 claimants and other claimants to be approved. (The exact percentage is not determinable until all claims are processed and until all funds subject to the policy are recovered by the DOE).

The DOE distribution policy provides that any funds recovered by it which are not awarded to successful claimants should be distributed equally to the States of the United States and the United States (Treasury) as parens patriae, in large

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[2](...continued)
impossibility of identifying and making payment to those who suffered pecuniary losses due to violations of the ESA"; the "impossibility" was eliminated by a study by DOE of the absorption of injury by refiners, establishing it to be 2.7 to 8.1%, with the balance of injury passed on, principally to end users, rather than the 100% which refiners had claimed, Report of OHA to Stripper Well Court, 7 Energy Mgmt. (CCH) par. 90,507. The Stripper Well settlement, reflecting that absorption study, and adopting a policy of restitution to injured end users, ensued.

part in acknowledgment that some 50 to 60% of refined oil products were purchased for use as automobile fuel or for home heating, and that such individual purchasers have individual claims which are too small to justify individual awards. Statement of Modified Restitutionary Policy in Crude Oil Cases, 51 Fed. Reg. 27,899 (1986), 7 Energy Mgmt. (CCH) par. 80,508A.

The primacy of restitution to identified injured claimants was endorsed by Congress in the adoption of the Petroleum Overcharge Distribution and Restitution Act of 1986 ("PODRA"), 15 U.S.C. Sec. 4501 et seq. As the Court of Appeals for the Federal Circuit itself, in an in banc opinion explained, "PODRA requires the DOE to reserve sufficient funds to make restitution to those who suffered the actual losses, 15 U.S.C. Sec. 4502(c)(1), and to pay the excess to federal and state treasuries 'as indirect restitution'", Texas American Oil Corp. v. U.S. Dept. of Energy, 44 F. 3d 1557, 1568 (Fed. Cir. 1995).[3]

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[3] In Texas American, the Federal Circuit noted that PODRA "superseded" the Warner Amendment, and its award of

(continued...)

The specific proportionality formula promulgated by DOE for individual refunds of crude oil overcharge recoveries, including the inclusion in "recovered funds" for calculation purposes of the amounts distributed to end users in Stripper Well (characterized by DOE as "full parity"), was approved by the Temporary Emergency Court of Appeals in In re The Department of Energy Stripper Well Exemption Litigation, (Stripper Well III), 857 F. 2d 1481, 1484 (TECA 1988).

However, DOE has adopted a conflicting policy, i.e to limit the portion of recovered funds to be awarded to individual claimants to 20%, even though such would thwart the DOE adopted formula, with claimants receiving less than 2/3 of the 31 to 32% to which they are entitled pursuant to the DOE restitution formula.

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[3](...continued)
recovered crude oil funds to the States; it therefore necessarily also "superseded" (i.e. eliminated the precedent of) the other settlements in which DOE had distributed refunds to the States (Exxon, supra) or the U.S. Treasury (Payne 22, supra, Cities, supra). (See footnote 2)

It is that 20% limitation which plaintiffs here seek to strike.

The origin of the 20% limitation, and its sole basis, was an estimate made by the States and the DOE in crafting the Stripper Well Settlement, in which a policy of individual claimant restitution was agreed to and announced. DOE and the States contemplated that the claims process before DOE which was to ensue would take a significant amount of time. (It has taken more than 10 years and is still not completed). Rather than await the completion of the claims process and a definitive determination of the portion of the refunds which would remain for distribution to them, they desired to obtain for public use what they believed was a conservative estimate of the funds which would remain after all claimant awards. They estimated that under no conceivable circumstances would successful claimants be awarded as much as 20% of the funds to be recovered pursuant to the DOE restitution which was to be adopted (but which was to mirror the formula already in use for refined product refunds).

Accordingly, they agreed to, and DOE has implemented, a procedure of making available immediately upon the recovery from a particular producer 80% of the funds recovered, retaining 20% in a U.S.

Treasury account for individual claimants. Under the contemplated procedure, upon the completion of the claims awards, the States and the United States would divide that portion of the 20% not in fact needed for individual claimant awards.

As it has turned out, the estimate has proven wrong.

As noted above, the proportionality formula with its judicially approved "full parity" component, would require the use of 31-32% of recovered funds for individual claimant restitution.

In the instant litigation, plaintiffs seek to have the 20% limitation stricken. The effect would be to restore to the 85,000 claimants some $300 million being diverted to the States of the United States and the U.S. Treasury.

In the District Court, the States and the United States moved to dismiss the Complaint on the basis of lack of standing on the part of plaintiffs. They argued--and the District Court agreed--that claimants to the "restitution" funds were not within the zone of interests intended to be protected by the statutory provision pursuant to which the funds were recovered "for restitution" by the DOE. ESA Sec. 209.

The Court of Appeals for the Federal Circuit, to which Court petitioners

appealed, affirmed the District Court but not on the basis on which the District Court had acted, i.e. lack of standing because the plaintiffs were not within the zone of interests intended to be protected by the statute.

Instead, the Court of Appeals, sua sponte, on a basis not briefed by the parties, held there was no cause of action properly asserted.

It did so on the basis of a series of decisions of this Court which have found a lack of an implied cause of action available to private plaintiffs in statutory provisions providing solely for a public cause of action.

Application of the principle of such cases would preclude plaintiffs from themselves invoking ESA Sec. 209 in an action against crude oil producers or resellers to recover overcharges. But the plaintiffs did not, of course, bring suit pursuant to ESA Sec. 209, but rather pursuant to ESA Sec. 211.

Moreover, in the discussion of the Supreme Court decisions upon which it relied, the Court of Appeals specifically found, contrary to the District Court, that plaintiffs were indeed within the zone of interests intended to be protected by the statutes involved.

Jurisdiction in the District Court

was pursuant to ESA Sec. 210 and 211, and 28 U.S.C. Sec. 1331. Jurisdiction in the Court of Appeals was pursuant to the Federal Courts Administration Act of 1992, Pub. L. 102-572,Sec. 102 (a), 106 Stat. 4506 (1992).

ARGUMENT

I THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO CALL FOR THIS COURT'S EXERCISE OF JUDICIAL SUPERVISION, (i) BY MISAPPLYING DECISIONS OF THIS COURT, (ii) BY DOING SO SUA SPONTE, AND THEN DENYING RECONSIDERATION, AND (iii) BY ESTABLISHING A PRINCIPLE WHICH WOULD DENY THE FUNDAMENTAL RIGHT OF APPEAL TO CLAIMANTS REJECTED BY ADMINISTRATIVE ACTION OF THE U.S. DEPARTMENT OF ENERGY

In briefing and oral argument to a panel of the Court of Appeals for the Federal Circuit, the appellants, the federal defendants, and the States intervening as defendants, addressed only the basis on which the District Court had dismissed, i.e. lack of standing on the part of plaintiffs on the ground that they were not within the zone of interests

intended to be protected by ESA Sec. 209.

In its decision, the Federal Circuit declared that it "first must consider... whether plaintiffs have stated a valid cause of action."

It determined that they had not, based on a series of decisions of this Court holding that where a statute creates a public cause of action, it does not create an implied private cause of action unless four factors are present, including,

1. "First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted'...--that, is does the statute create a federal right in favor of the plaintiff.?"

2. " Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one..."

Cort v. Ash, 422 US 66, 78 (1975)

The Federal Circuit panel found that the first factor was "unquestionably" present: "plaintiffs are a member of the class for whose benefit the statute was enacted..."

It found, however, a legislative intent to permit only the government to initiate an ESA Sec. 209 action seeking to recover oil overcharges from a producer of oil, principally by virtue of the

existence of a parallel provision of the ESA, Sec. 210, pursuant to which private litigants may seek to recover overcharges from a producer of oil.[4]

The panel reasoned that since private litigants had a statutorily provided cause of action, they have no implied right to prosecute an overcharging oil producer under ESA Sec. 209.

But the principle established--that these plaintiffs cannot invoke ESA Sec. 209 to sue an oil producer to recover overcharges--has no applicability to the instant situation.

Plaintiffs have not brought an action against an oil producer, but rather against the Secretary of Energy, essentially appealing a series of

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[4] In National R.R. Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974), the case principally relied upon by the Court, this Court held that an association of railroad passengers could not sue Amtrak to precude announced train discontinuances on the basis of an argument that since the statute provided for such actions by the Attorney Gneral, affected passengers had the implied right to bring such a suit.

decisions of the DOE denying them the full fruits of overcharge recoveries already made by the DOE from oil producers.

And plaintiffs' asserted cause of action was not brought pursuant to ESA Sec. 209, but rather pursuant to ESA Sec. 211 which clearly contemplates actions against the DOE as a method of appealing an administrative action denying, or improperly limiting, recovery. McCulloch Gas Processing v. Canadian Hidrogas, 577 F. 2d 712 (TECA 1978).[5]

In a Petition for Rehearing and Suggestion for Rehearing In Banc, these petitioners explained the inapplicability

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[5] In an earlier decision, TECA had held that ESA Section 210(a) provides standing to challenge agency orders, American Nursing Home Association v. Cost of Living Council, 497 F. 2d 909 (TECA 1974); the language of the statute and the legislative history both support such an interpretation of Sec. 210. S. Rep. 92-507, 92d Cong., 1st Sess., reprinted in 1971 U.S.C.A.A.N. at 2291, and at least one District Court decision since McCulloch has held that a challenge to a DOE order was properly brought under Sec. 210. Exxon Corp. v. DOE, 577 F. Supp. 703, 705 (D. Del. 1983)

of the principle that a private party could not initiate an enforcement action against an oil producer pursuant to ESA Sec. 209 to the situation here involved, i.e. a challenge to DOE with regard to the distribution of recoveries it had already made pursuant to ESA Sec. 209.

Both the Petition for Rehearing and Suggestion for Rehearing In Banc were denied, without comment despite the fact that the panel initially had departed from the accepted and usual course of judicial proceedings by (i) deciding the case on a basis not argued by the parties, and (ii) in the course of the decision rendered a determination that the District Court had erred in the very ruling on the basis of which it had dismissed the Complaint; the basis of the District Court decision was a holding that the plaintiffs were not within the zone of interests intended to be protected by ESA Sec. 209, while the Federal Circuit panel held that "plaintiffs are a member of the class for whose benefit the statute was enacted."

Under such circumstances, and where the precedents relied upon by the panel were clearly inapplicable to a suit against DOE as to already recovered funds, it was a further and inexcusable departure from the accepted and usual course of judicial proceedings to deny rehearing.

The principle implemented by the Federal Circuit in the instant matter is presumably that those who are the intended beneficiaries of restitution pursuant to ESA Sec. 209 have no cause of action to challenge the denial or limitation of restitution awards to them.

In the instant case, the challenge they sought to mount was to a limitation on awards to those whose right to restitution has been recognized, i.e. the plaintiffs and 85,000 others. The limitation involved, i.e. that no more than 20% of recovered funds can be used for individual claimant restitution, has the effect of limiting the restitution awards to some two-thirds of that to which the DOE judicially-approved formula would provide them. (As noted, the formula would require the use of 31-32% of recovered funds for individual claimant restitution; each approved claimant will accordingly receive only 20/31-32 of that to which they are entitled by the DOE formula.)

But the newly announced principle is, of course, not limited to this case.

Its most clearly parallel potential application would be to deny the right to approved individual claimants to challenge a possible decision of the DOE not to continue the distribution. To date, the DOE has made two distributions to approved

claimants, an initial distribution of $800 per million gallons of refined product purchases by each claimant during the regulatory period, and an "interim" distribution of an additional $800 per million gallons. An estimated $160 million or more (beyond that needed for initial and interim payment to claimants yet to be approved) has been, or will be, placed in the U.S. Treasury escrow for individual claimants. Pursuant to DOE policy to distribute such funds to approved claimants, such will result in a minimum additional distribution to each approved claimant of $400 per million gallons.

But the DOE has indicated in recent decisions approving claimants that it has not yet determined whether to honor its policy and the statutory mandate of ESA Sec. 209 and PODRA to distribute the available funds to approved claimants. Should the DOE decline to do so, the principle established by the instant decision, if applied, would presumably preclude a challenge to such a decision by the claimant beneficiaries.

And the principle of the Federal Circuit decision here would also presumably deny the right of any claimant with a pending claim to challenge in court a decision by the DOE to deny the claim in whole or in part. Such a right has not

only been universally recognized by the courts (see the discussion in II below), but was here acknowledged both by the DOE and the States in their briefing and oral arguments. Most troublesome questions of equal application would be presented if, after more than a decade in which the right of individual claimants to judicial appeal has been recognized, such a right was eliminated as to the remaining unresolved claims.

II THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT, WHICH HAS EXCLUSIVE APPELLATE JURISDICTION, HAS RENDERED A DECISION ON AN IMPORTANT MATTER IN CONFLICT WITH ITS OWN DECISIONS, THOSE OF ITS PREDECESSOR, THE TEMPORARY EMERGENCY COURT OF APPEALS, AND THOSE OF THE DISTRICT COURTS

Prior to the decision here, the appellate Courts with exclusive ESA jurisdiction (first TECA, and now the Federal Circuit) have not questioned the existence of a cause of action by individual claimants to appeal DOE orders, either orders denying participation before OHA, or orders denying ESA Sec. 209 restitution to private claimants. Repeatedly, they have merely moved to the merits.

Suffice it to note as examples, in the first category, Consolidated Edison Co. v. Breznay, 873 F.2d 301, 311 (TECA 1989), the Court noting that "(t)here are many cases of this Court and administrative orders of OHA holding that a timely and appropriate request to participate in an enforcement (ESA Sec. 209) proceeding should be granted by OHA..."; and, in the latter category, Mullins v. U.S. Department of Energy, 50 F. 3d 990 (Fed. Cir. 1995), in which, in dissent on the merits of the challenge, Chief Judge Archer noted, without disagreement by the majority: "Energy does not, however, have unfettered discretion to decide how to allocate this restitution. Congress provided that interested parties may appeal such decisions to the district courts...and that any appeal from a district court's decision will be had to the Federal Circuit..." (50 F. 3d at 993)[6].

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[6] In recognizing the right of individual claimants to challenge restitution awards, Mullins "superseded" the earlier TECA decisions such as Exxon, supra, Payne 22, supra, Cities, supra, which denied the right of individual

(continued...)

The decision in Mullins is particularly significant as an expression of the unvarying assumption of both the Federal Circuit and its predecessor as the designated appellate court in ESA matters, the Temporary Emergency Court of Appeals, that there is a cause of action against DOE which may be brought by disappointed claimants where DOE decisions have limited awards.[7]

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[6](...continued)
claimants to challenge crude oil refund awards to the States and the U.S. Treasury, holding that they had no standing because they were not within the zone of interests intended to be benefitted by the ESA. (See footnote 2). It therefore eliminated the basis on which the District Court acted here, i.e. finding a lack of standing because the plaintiffs do not "fall within the zone of interests meant to be protected by the statutory scheme." So the Federal Circuit recognized here, finding that "unquestionably" "plaintiffs are a member of the class for whose benefit the statute was enacted..."

[7] The exclusive jurisdiction of the Temporary Emergency Court of Appeals was (continued...)

In Mullins, the dispute was over the allocation of the amount of $1.25 billion recovered from Texaco in an ESA Sec. 209 settlement. The issue was to what extent the recovery should be attributed to violations by Texaco as a crude oil producer ("crude oil refunds"), and to what extent to Texaco as a refiner ("refined product refunds"). The allocation was important because only those who purchased directly from Texaco were eligible to divide the refined product refunds, while all purchasers of product refined in the United States were entitled to claim from the crude oil refunds. In Mullins, a group of claimants eligible to share only in the refined product refunds brought action to require DOE to allocate more of the recovery to refined product refunds than it had initially done.

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[7](...continued)
transferred to the Court of Appeals for the Federal Circuit by the Federal Courts Administration Act of 1992, Sec. 102, Pub. L. 102-572, 106 Stat. 4506. The decisions of TECA were adopted "as precedent" by the Federal Circuit in Texas American Oil Corp. v. Dept. of Energy, supra, 44 F. 3d at 1561.

TECA reversed a District Court decision which had dismissed the action on the ground of lack of ripeness, TECA holding that the issue was ripe for determination because the shift of funds to the refined product pool would increase the amounts to be received by refined product claimants Mullins v. U.S. Department of Energy, 964 F. 2d 1149, 1151 (TECA 1993).[8] On remand in Mullins, the District Court considered the DOE allocation on the merits and refused to disturb it, and the Federal Circuit (which had by then succeeded TECA as the appellate court in ESA matters) affirmed. 821 F. Supp. 1194 (W.D. Ky 1993), 50 F. 3d 990 (Fed. Cir. 1995). Neither the DOE nor the Federal Circuit raised any issue as to the existence of a cause of action challenging a decision of DOE to limit awards to approved claimants by virtue of

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[8] As TECA noted, DOE had no objection to the justiciability of the matter as framed by TECA: "The Appellees do, however, acknowledge that if the issues in the Plaintiffs' original Complaint had been framed as the Plaintiffs have now framed the issues on appeal, Plaintiffs would have stated a valid claim that is ripe for resolution."

allocation of recovered funds.

The cause of action asserted here is precisely of the same nature. Indeed, the issue here involves a sub-allocation of the funds allocated to crude oil refunds; in the instant matter, those who will share in the crude oil refunds obtained from Texaco (and other crude oil producers) complain of the allocation of those crude oil refunds by DOE, i.e. limiting the award of Texaco funds to individual claimants to 20% of the crude oil refunds, and distributing 80% to the States and the United States.[9]

If a complaint as to the allocation of refunds as between refined product refunds and crude oil refunds asserts a cognizable cause of action, then a

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[9] The Texaco recovery was the largest single recovery from any producer, and represents more than one-third of the crude oil refunds which DOE is distributing, 20% to claimants and 80% to the States and the United States. By awarding to claimants only 20% rather than the 31-32% to which they are entitled by the DOE allocation formula, DOE is depriving individual claimants of more than $100 million in this case alone.

complaint as to the allocation of the crude oil refunds necessarily sets forth a cause of action.

Thus, the instant Federal Circuit decision is entirely inconsistent with the decisions of both TECA and the Federal Circuit in Mullins. However, not only has the Federal Circuit not repudiated or overruled Mullins in the instant decision, but it has cited Mullins as authority for dismissal on the merits of a contention by plaintiffs here as to the allocation of any funds to the United States from refunds obtained in one of the matters as to which DOE has made a 20%-80% distribution, a settlement with Occidental Petroleum Corporation. Thus, the instant decision is also internally inconsistent, acknowledging a cause of action potentially exists as to the allocation to the United States in the Occidental Petroleum matter, while denying that there is a cause of action as to allocation as between the claimants on the one hand and the United States and the States on the other hand as to the very same Occidental Petroleum refunds.

The instant decision is also inconsistent with the in banc decision of the Federal Circuit in Texas American, supra. In that decision, as already noted, the Federal Circuit explained that "PODRA

requires the DOE to reserve sufficient funds to make restitution to those who suffered the actual losses, 15 U.S.C. Sec. 4502(c)(1), and to pay the excess to federal and state treasuries 'as indirect restitution'", 44 F. 3d at 1558.[10]

The principle of the instant holding, that "those who suffered the actual losses" are without a cause of action to assert that DOE has failed to "reserve sufficient funds to make restitution" to

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[10] The Federal Circuit in banc holding quoted in the text rejected the basis of the TECA denial of intervention to private claimants in Getty Oil Co. v. DOE, 865 F. 2d 270, 276 (TECA 1988), i.e. "PODRA confers no legally cognizable interest in appellants (including plaintiffs here) sufficient to create a right to intervene..." Moreover, the denial in Getty of the standing of claimants to intervene to challenge allocation of refunds has been eliminated as a precedent both by the TECA decision in Mullins implicitly recognizing standing in such a situation, and by the holding of the Federal Circuit here that claimants are within the zone of interests intended to be benefitted by ESA Sec. 209 and PODRA.

them precludes any possibility of enforcement of the mandate of PODRA as enunciated by the Federal Circuit.

Such two inconsistent holdings--that individual claimants are entitled to sufficient funds, but they are without the right to obtain them, require action of this Court at least to as great an extent as do conflicting decisions of two separate Courts of Appeals.

Moreover, such inconsistency within the same Court, as is represented by Mullins and Texas American on the one hand and the instant decision on the other, demonstrate such departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

Nor is Mullins alone as a case in which a cause of action to challenge DOE refund awards was recognized and disposition was made on the merits.

For a decade, the courts have entertained and disposed on the merits of challenges by disappointed claimants to funds obtained by DOE from alleged overcharging oil companies.

With the adoption of a policy of crude oil refund awards to claimants, disappointed claimants sought judicial review of DOE decisions denying them recovery in whole or in part. DOE made no

objection to the existence of a cause of action, or the standing of the disappointed claimants to assert such, and the courts in which relief was sought themselves found no lack of cause of action or standing, but moved on to merit determinations, sometimes affirming and sometimes reversing DOE.(e.g. Florida Rock Industries v. John S. Herrington et al, 700 F. Supp.605 (D.D.C. 1988), Mid-America Dairymen Inc. v. Herrington, 878 F. 2d 1448 (TECA 1989) and City of New York v. Watkins, 757 F. Supp. 72 (D.D.C. 1991)[11]

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[11] In so recognizing a cause of action and the standing of crude oil refund claimants to complain of the denial of funds by DOE, DOE and the courts were applying in such cases the precedent of recognized standing in connection with claims for refined product refunds, e.g. Atlantic Richfield Co. v. DOE, 618 F. Supp. 1199 (D. Del. 1985.) (In refined product overcharge cases, (i) the violations were by refiners, resellers or retailers, (ii) there had been no conflicting claims preventing individual claimant awards, and (iii) the DOE had adopted a policy of

(continued...)

Nor did either DOE assert, or TECA find, either lack of standing or a failure to state a cause of action when claimants denied refunds asserted a right to refunds on behalf of an entire class in Burlington Industries v. Watkins, 916 F. 2d 722 (TECA 1990). There, suit was brought by a group of claimants denied restitution in the DOE proceedings because they, or affiliates, had recovered for a part of their oil product purchases in Stripper Well (e.g. a manufacturer claimant before OHA whose trucking division had recovered for its trucking use in Stripper Well), and had executed waivers of the right to additional refunds. Thus, essentially claimants who had received a refund, but in their view an inadequate one, were suing to recover additionally. (This is the precise situation here, plaintiffs asserting that their recoveries are improperly diminished by virtue of the 20% limitation.)

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[11](...continued)
such awards immediately after deregulation made it impossible to rectify overcharges through the regulatory mechanism, e.g. Office of Special Counsel/ Tenneco Oil Co., 9 DOE (CCH) par. 82,538 (1982).

Significantly, when these same plaintiffs previously sought to challenge the 20% limitation, their complaint as to the limitation was dismissed for lack of ripeness (because it was not yet clear that the proportionality formula would require the use of more than 20% of the funds recovered), but not either for lack of standing or for the failure to state a cause of action. Consolidated Edison Co v. Herrington, 752 F. Supp. 108 (D.D.C. 1990), affirmed "on the basis of the district court opinion" 927 F. 2d 1227, 1228 (TECA 1991).[12]

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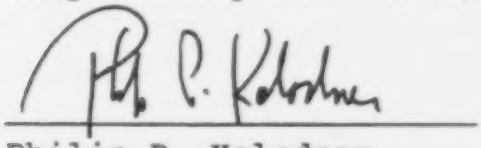
[12] The failure of DOE to assert, and of the Court to find, lack of standing as to the 20% limitation is particularly significant because the DOE there challenged successfully other counts of the same complaint on the basis of lack of standing.

CONCLUSION

For the reasons above stated, a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

United States Court of Appeals
for the Federal Circuit
96-1248, -1257

CONSOLIDATED EDISON COMPANY OF NEW YORK, LONG ISLAND LIGHTING COMPANY, ORANGE AND ROCKLAND UTILITIES, PACIFIC GAS AND ELECTRIC COMPANY, SAN DIEGO GAS AND ELECTRIC COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, CHAMPION INTERNATIONAL CORPORATION, FEDERAL PAPER BOARD COMPANY, INC., INTERNATIONAL PAPER COMPANY, and WEYERHAUSER COMPANY,
Plaintiffs-Appellants,

v.

Hazel R. O'Leary, SECRETARY OF ENERGY, and George B. Breznay, DIRECTOR, OFFICE OF HEARINGS AND APPEALS, DEPARTMENT OF ENERGY,
Defendants-Appellees,

and

STATES OF ALABAMA, CALIFORNIA, CONNECTICUT, IDAHO, INDIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, OHIO, SOUTH DAKOTA, VERMONT, WISCONSIN, and WYOMING,
Defendants-Appellees,

and

STATES OF DELAWARE, HAWAII, ILLINOIS, KANSAS, NEBRASKA, NEVADA, NORTH CAROLINA, RHODE ISLAND, and WEST VIRGINIA, and TERRITORY OF GUAM AND THE VIRGIN ISLANDS,

Defendants-Appellees.

DECIDED: June 19, 1997

Before MICHEL, PLAGER, and BRYSON, Circuit Judges.

Plager, Circuit Judge.

At issue in this appeal from judgments of the United States District Court for the District of Columbia[1] is entitlement to a portion of some $2.9 billion recovered by the United States. The money was recovered from producers and resellers of crude oil pursuant to a statutory scheme authorizing such recoveries. See Economic Stabilization Act Amendments of 1971, Section 209, Pub. L. No. 92-210, 85 Stat. 743 (1971). Plaintiffs, a group of utilities and other large crude oil consumers, are entitled to share in the proceeds under the formula established by the Government, but complain that the share they are receiving is sufficient. In two separate suits, consolidated by the district court and here, they sued the United States, through the Department of Energy, and a group of states, all of whom are, under the formula, competing claimants for the fund.

The district court dismissed both complaints, and the plaintiffs brought their appeals here. The two questions presented are whether the appeals are properly lodged in this court, and whether the district court

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[1]Consolidated Edison Co. Of New York v. Hazel R. O'Leary, Nos. 96-0225 and 95-0698 (D.D.C.)

correctly gave judgment for the defendants. They are, and it did. Affirmed.

1. BACKGROUND

The Economic Stabilization Act (hereafter "the Act" or "ESA"), first enacted in 1970 and amended in substantial ways in 1971, authorized the President to issue orders and regulations to stabilize prices, rents, wages, and salaries. The Executive actions taken under the Act resulted in lengthy and enduring litigation. This is one of those suits.

Under the initial Act, the method of enforcement was by injunction or fine. See Economic Stabilization Act, Pub. L. No. 91-379, 84 Stat. 799 (1970). In 1971 Congress amended the Act, inter alia, to permit district courts, in enforcement suits brought by the Attorney General of the United States, to order "restitution of moneys received in violation" of these price controls. Economic Stabilization Act Amendments of 1971, Section 209, Pub. L. No. 92-210, 85 Stat. 743 (1971).

The amended Act, in separate section 210, also provided for a private cause of action for persons "suffering legal wrong because of any act or practice arising out of this title" in violation of the price controls. This "private attorney general" provision allowed private litigants to recover

money damages (including treble damages and attorneys fees in some cases) in addition to obtaining injunctive relief. Id.

A few years later, in response to the oil embargo by the Organization of Petroleum Exporting Countries (known as "OPEC"), Congress passed the Emergency Petroleum Allocation Act of 1973 ("EPAA"), Pub. L. No. 93-159, 87 Stat. 627, codified at 15 U.S.C. §753(b)(1)(F) (1982). Petroleum price regulations were subsequently promulgated by the Department of Energy (then called the Federal Energy Office). See 15 U.S.C. §754(a)(1) (1982).

Thus a comprehensive regulatory scheme was established pursuant to the EPAA and enforced under Section 209 of the ESA. IN due course the implementation and enforcement of this scheme produced huge recoveries for crude oil overcharges. Not surprisingly, there was an ensuing struggle over how this money would be distributed. This struggle came to a head in the multi-district litigation entitled In re The Department of Energy Stripper Well Exemption Litigation, conducted in the District Court of Kansas. See generally In re The Dept. of Energy Stripper Well Exemption Litigation, 653 F.Supp. 108 (D. Kan. 1986) (Stripper Well). As the district court judge noted in that case, "Like flies to honey, claimants are quickly drawn by a fund containing over one billion dollars."

Stripper Well, 578 F.Supp. 586, 589 (D. Kan. 1984). The particular violations involved in that case are not directly relevant to the present case. What is relevant, however, is the resulting DOE distribution policy that flowed therefrom.

Patterned after the eventual settlement in Stripper Well, DOE established a policy for allocating all crude oil overcharges recovered pursuant to Section 209 of the ESA. That policy established that 20% of the overcharges would be retained by DOE to pay individual claims. The remaining 80% was to be allocated half to the United States treasury and half divided evenly among affected states to be used to fund approved energy-related programs that are designed to benefit consumers of petroleum products within the states. See Statement of Modified Restitutionary Policy In Crude Oil Cases, 51 Fed. Reg. 11,737, 11,739 (Aug. 20, 1986). This was essentially the same allocation formula arrived at in the Stripper Well settlement. As DOE stated in its policy statement, the "settlement negotiations provided an appropriate vehicle for exploring the resolution of those issues in all crude oil cases." 51 Fed. Reg. at 11,738.

The 20% portion of crude oil overcharges to be distributed to individual claimants was to be apportioned according to a system administered by DOE. This system is known as

"Subpart V" after the corresponding DOE regulations. See 10 C.F.R. Part 205, Subpart V. In this system, claimants are entitled to a refund proportional to their volume of crude oil consumption. Stated simply, under this method, known as the overcharge moneys (the "numerator") by the total volume of U.S. consumption of petroleum products during the period of price controls (the "denominator"). This resulting fraction is then multiplied by the individual's volumetric consumption to produce the resulting refund. See Notice Explaining Procedures for Processing Refund Applications in Crude Oil Refund Proceedings Under 10 C.F.R. Part 205, Subpart V, 52 Fed. Reg. 11,737, 11,740 (April 10, 1987). Included in the numerator, for purposes of calculating claims, is an additional amount of some $985 million equal to the amount distributed in Stripper Well, in order to bring claimants into "full parity" with those who recovered under Stripper Well. 51 Fed. Reg. at 11,739.

As noted, appellants in this consolidated appeal are a group of utility companies and pulp and paper companies

(hereafter referred to collectively as "plaintiffs").[2] They are among some 85,000 individual claimants seeking to share in that portion of the fund allocated to such individual claimants under the Subpart V program. Because of the volume of their purchases of crude oil, the ten plaintiffs receive, pursuant to the formula, approximately 14% of the moneys distributed to all 85,000 claimants. The utility companies, which receive more than three-quarters of the refunds to the ten plaintiffs, are obligated to pass the funds through to their customers.

Plaintiffs filed two complaints in the district court for the District of Columbia. In their first complaint, No. 95-CV-698, they sought a declaratory judgment that the 20% limit imposed by DOE should not be used to limit claims under the Subpart V program.[3] In

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[2]Plaintiffs brought their suits as class actions under Federal Rule of Civil Procedure 23(a). The class, however, was never certified by the district court.

[3]In an additional count, plaintiffs challenge a proposed distribution to the Defense Logistics Agency ("DLA") of the United States on the ground that the DLA is a government agency, which should be paid out of the share allocated to the United States. Since plaintiffs' right to bring this count is

the second complaint, No. 96-CV-225, they challenged the allocation of $275 million received from a settlement of overcharges by Occidental Petroleum Corporation (OXY). They sought a preliminary injunction to preclude DOE from distributing 80% of the available OXY refunds to state and federal governments. The district court denied the requested preliminary injunction and dismissed both complaints on the grounds that plaintiffs did not have standing to assert their claims.

Plaintiffs brought their appeals here, but also filed protective appeals in the Court of Appeals for the District of Columbia Circuit. Unopposed motions were filed in, and granted by, that court, deferring briefing until this court determines whether it has jurisdiction over the appeals.

II. DISCUSSION

A. JURISDICTION

The first question is, which is the proper forum for appellate review, this court or the United States Court of Appeals for the District of Columbia Circuit. The district court exercised jurisdiction over plaintiffs' complaint pursuant to Section 211 of the ESA,

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subsumed under the discussion regarding their second complaint, infra, it is not discussed separately.

which vests district courts with jurisdiction over "cases or controversies arising under this title, or under regulations or orders issued thereunder. . . ." ESA §211(a). We have jurisdiction over this appeal from the district court's judgment pursuant to 28 U.S.C. §1295(a)(11), which vests this court with appellate jurisdiction over "an appeal under section 211 of the [ESA]." See Texas Am. Oil Corp. v. United States Dept. of Energy, 44 F.3d 1557, 1563 (Fed. Cir. 1995) (Jurisdiction is proper if: "(1) the resolution of the litigation must have required application or interpretation of the EPAA/ESA or its regulations, and (2) the EPAA/ESA issue must have been adjudicated in the district court."). In short, jurisdiction was properly exercised by the district court, and the appeal is properly before us.

B. PLAINTIFFS' CLAIMS

1. CHALLENGE TO THE 20% LIMIT

It is established law that a complaint should be dismissed for failure to state a claim when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Even assuming the facts asserted in the complaint are true, which we are required to do in reviewing the grant of a motion to

dismiss, plaintiffs cannot prevail on their challenge to the 20% cap.

Congress established a bifurcated system for enforcing the ESA. Under Section 209, as added in 1971, Congress authorized "the Attorney General to bring an action in the appropriate district court of the United States" for violation of price controls established by order or regulation pursuant to the Act. This public cause of action is enforceable by injunction, as well asa by a court order for "restitution of moneys received in violation of any such order or regulation." The legislative history makes clear that Congress wanted courts to have the power to "set things right" by ordering restitution in appropriate cases. S. Rep. No. 92-507, at 9 (1971).

DOE acting under this authority has recovered large sums from companies that violated these price controls. See, e.g., Stripper Well ($1 billion); Final Consent Order with Occidental Petroleum Corp., 60 Fed. Reg. 43130 (Aug. 18, 1995) ($275 million); Final Consent Order with Murphy Oil Corp., 59 Fed. Reg. 47315 (Sept. 15, 1994) ($10.7 million); Final Consent Order with Salomon Inc., 55 Fed. Reg. 47374 (Nov. 13, 1990) ($83.75 million); Final Consent Order with Howell Corp., 54 Fed. Reg. 18138 (Apr. 27, 1989) ($19.375 million); Final Consent Order with Texaco, Inc., 53 Fed. Reg. 32929 (Aug.

29, 1988) ($1.25 billion); Final Consent Order with Enron Corp., 53 Fed. Reg. 28260 (July 27, 1988) ($48 million); Final Consent Order with Phillips Petroleum Co., 53 Fed. Reg. 10928 (Apr. 4, 1988) ($30 million); Final Consent Order with Exxon Corp., 51 Fed. Reg. 36052 (Oct. 8, 1986) ($36.9 million); Final Consent Order with Marathon Petroleum Co., 51 Fed. Reg. 3820 (Jan. 30, 1986) ($30 million); Final Consent Order with Atlantic Richfield Co., 50 Fed. Reg. 26603 (June 24, 1985) ($65.7 million); Final Consent Order with Gulf Oil Corp., 50 Fed. Reg. 24929 (June 14, 1985) ($142 million); Final Consent Order with Mobil Oil Corp., 49 Fed. Reg. 30354 (July 39, 1984) ($27 million).

In addition to authorizing the Attorney General of the United States to pursue violators, Congress in the 1971 amendments also authorized individuals "suffering legal wrong" to bring an action against violators. Section 210 of the ESA authorizes:

> Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment,

> writ of injunction (subject to the limitations in section 211), and/or damages.

This section further vests district courts with the power to award treble damages and attorneys' fees. See ESA §210(b). Congress adopted this section "so that it would serve not only to provide a means to recover losses, but [to] provide a strong deterrent to those who would willfully violate this Act." H. Rep. No. 92-714, at 8 (1971). Congress thereby created a powerful incentive for harmed individuals to vindicate their private rights under this section of the ESA, paralleling those in other statutory schemes. See, e.g., 15 U.S.C. §15 (1994) (violation of antitrust laws); 12 U.S.C. §2607 (1994) (violation of anti-kickback laws); 7 U.S.C. §2570 (1994) (violation of plant variety protection laws).

In view of Congress' decision to separately structure public and private remedies under the ESA, the question emerges whether a private complaint states a claim upon which relief may be granted when the complaint challenges the allocation of funds obtained under the public remedies section of the Act. Although the district court dismissed the present complaints for lack of standing, and it was that issue that was briefed by the parties before this court, we first must consider whether the action is

maintainable, that is, whether plaintiffs have stated a valid cause of action, "for it is only if such a right of action exists that we need consider whether the respondent had standing to bring the action. . . ." National R.R. Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 456 (1974) (Amtrak).

The Supreme Court has fashioned a four-factor test to determine whether a private cause of action should be implied from a statute not expressly providing one.

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," --that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78 (1975) (internal citations omitted). Two of the four factors unquestionably support plaintiffs' position: plaintiffs are a member of the class for whose benefit the statute was enacted and there are no comparable state statutes governing price controls. Subsequent cases, however, have made clear that the remaining two factors predominate. "[U]nless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 94 (1981); Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 145 (1985); Amtrak, supra.

In Amtrak, the Court considered whether respondents had a private cause of action to challenge certain train discontinuances in light of §307(a) of the Rail Passenger Service Act of 1970 ("Amtrak Act"), 84 Stat. 1327, codified at 45 U.S.C. §501 et seq. That section vested the district courts with jurisdiction over violations of the Amtrak Act as well as created a "public cause of action, maintainable by the Attorney General, to enforce the duties and responsibilities imposed by the Act." Amtrak, 414 U.S. at 457. In addition, section 307(a) provided a private cause of action, as in the present case, but

only under certain circumstances.[4] Id. at 460. Respondents argued in that case that the court should imply a private cause of action because they "are the intended beneficiaries of the Act." Id. The district court dismissed for lack of standing. The court of appeals

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[4]Section 307(a) provided:

> If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this chapter, refuses, fails, or neglects to discharge its duties and responsibilities under this chapter, or threatens any such violation, obstruction, interferences, refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to precedent or terminate any violation, conduct, or threat.

reversed and held that respondents, who represented railroad passengers, had standing and that §307 did not bar a private suit. The Supreme Court reversed.

In reaching its decision, the Court was influenced by the existence of a carefully crafted remedial scheme that included both public and private, albeit limited, enforcement. The Court relief heavily on the "frequently stated principle of statutory construction . . . that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." Amtrak, 414 U.S. at 458 (citing Botany Mills v. United States, 278 U.S. 282, 289 (1929)).

As noted, section 209 of the ESA creates as public cause of action to enforce price controls. Section 210 creates a private cause of action to enforce the same. In construing the statutory language, we are guided by our predecessor court's oft-cited warning against "commingling of private and agency enforcement devices for which Congress has made separate provision. . . ." Payne 22, Inc. v. United States, 762 F.2d 91, 93 (Temp. Emer. Ct. App. 1985) (citation omitted). In light of this, we conclude that to stretch section 209 so as to encompass plaintiffs' private claims would be to "expand the coverage" of Section 209 "to

subsume" those remedies explicitly provided in Section 210.

The legislative history does not alter our construction of Section 209. That history makes clear that Section 210 is the exclusive remedy for private litigants. "This action [under Section 210] is intended to be brought by private persons against other private persons. The Government will not bring such action nor be the subject of one." S. Rep. No. 92-507, at 9 (1971); see Cities Service Co. v. Department of Energy, 715 F.2d 572, 573 (Temp. Emer. Ct. App. 1983) ("While sections 209 and 210 have a common purpose--the enforcement of DOE's regulations--they vindicate different rights."). If plaintiffs have been injured by overcharges, Congress created a generous remedy for private litigants in Section 210. In cases such as this, when Congress has provided a generous private remedy, we should be even more reluctant than the Court was in Amtrak to imply a private cause of action into a public one for fear of upsetting the delicate balance that Congress struck. See Massachusetts Mutual, 473 U.S. at 146 ("The six carefully integrated civil enforcement provisions found in §502(a) of the [ERISA] statute . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly."). Thus we conclude, as did the trial court, that plaintiffs' complaint

challenging the 20% limit should be dismissed.[5]

2. CHALLENGE TO INDIVIDUAL DISTRIBUTIONS

Plaintiffs' second complaint challenged DOE's distribution of funds received from a settlement for overcharges by Occidental Petroleum. In this complaint plaintiffs requested that the district court order DOE to reallocate the 40% payable to the federal government to the claimants' pool thereby bringing their pool's share up to 60%, i.e., 20% + 40% = 60%. Their basis for this claim was that even this increased amount was less than plaintiffs would have been entitled to had the Government not settled a potential $1.1 billion claim for a mere $275 million. Plaintiffs cite Mullins v. Department of Energy, 50 F.3d 990 (Fed. Cir. 1995) for support, on the theory that since we reached

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[5]Plaintiffs also rely on the Petroleum Overcharge Distribution and restitution Act of 1986 (PODRA), 15 U.S.C. §4501 et seq. In its complaint. The PODRA, however, provides only for the recovery of refunds through administrative proceedings that are consistent with the 20% limit. See 15 U.S.C. §4502(b)(1)(A)-(C) (1994). Accordingly, a cause of action does not lie under that statute.

the merits of the claim, we must have implicitly decided that there was standing to challenge the allocation under §209.

We agree with plaintiffs that Mullins decides the fate of this complaint. We disagree, however, as to what that fate is. In Mullins this court reviewed a challenge by several gasoline station owners to a final consent order between DOE and Texaco for alleged overcharges. Texaco's liability was estimated to be "in the billions of dollars." Id. at 991. The final settlement, however, set Texaco's liability at $1.2 billion. The settlement fund was to be allocated between two funds: one for restitution for violations regarding sales of crude oil, the other for restitution for violations regarding sales of refined products. Despite an initial estimate that attributed 84% of the overcharges due to crude oil sales and 16% due to the sale of refined products, the final allocation reserved 90% for the crude oil fund and 10% of the refined fund. Plaintiffs in that case challenged this allocation as inequitable and not supported by substantial evidence. Id. at 992. This court held that this allocation is effectively unreviewable on appeal, "[m]uch like the decisions of prosecutors regarding who to prosecute and who not." Id. at 993.

The same is true in this case. Plaintiffs are challenging the settlement as well as the allocation between various funds

of moneys received from an individual violator. This they cannot do under Mullins; the decision regarding the amount to settle for in a given case, in the absence of fraud or collusion, is a decision within the discretion of DOE. Id. As such it is non-justiciable. See Murphy v. United States, 993 F.2d 871, 873 (Fed. Cir. 1993) ("We have emphasized that judicial review is only appropriate where the Secretary's discretion is limited, and Congress has established 'tests and standards' against which the court can measure his conduct. Unless such a test or standard is provided, courts must abstain." (Internal citations omitted); Voge v. United States, 844 F.2d 776, 780 (Fed. Cir. 1988). Accordingly, we affirm the district court's judgment with respect to No. 96-CV-225.

In sum, the district court dismissed plaintiffs' complaints for lack of standing. Rather than resting our decision on standing we conclude that, with regard to the 20% cap, plaintiffs have failed to assert a claim upon which relief can be granted because private claimants have no express or implied cause of action under Section 209 of the ESA or under the PODRA. Plaintiffs' challenge to the distribution of funds received as a result of individual settlements likewise fails because this is a matter committed to the discretion of the agency.

CONCLUSION

Accordingly, the decisions of the district court dismissing both complaints are AFFIRMED.

United States Court of Appeals
for the Federal Circuit
96-1248, -1257

CONSOLIDATED EDISON COMPANY OF NEW YORK, LONG ISLAND LIGHTING COMPANY, ORANGE AND ROCKLAND UTILITIES, PACIFIC GAS AND ELECTRIC COMPANY, SAN DIEGO GAS AND ELECTRIC COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, CHAMPION INTERNATIONAL CORPORATION, FEDERAL PAPER BOARD COMPANY, INC., INTERNATIONAL PAPER COMPANY, and WEYERHAUSER COMPANY,
Plaintiffs-Appellants,

v.

Hazel R. O'Leary, SECRETARY OF ENERGY, and George B. Breznay, DIRECTOR, OFFICE OF HEARINGS AND APPEALS, DEPARTMENT OF ENERGY,
Defendants-Appellees,

and

STATES OF ALABAMA, CALIFORNIA, CONNECTICUT, IDAHO, INDIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, OHIO, SOUTH DAKOTA, VERMONT, WISCONSIN, and WYOMING,
Defendants-Appellees,

and

STATES OF DELAWARE, HAWAII, ILLINOIS,
KANSAS, NEBRASKA, NEVADA, NORTH CAROLINA,
RHODE ISLAND, and WEST VIRGINIA, and
TERRITORY OF GUAM AND THE VIRGIN ISLANDS,
Defendants-Appellees.

JUDGMENT

ON APPEAL from the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

in CASE NO(S). 96-0225, 95-698

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED June 19, 1997

Jan Horbaly, Clerk

ISSUED AS A MANDATE: August 22, 1997

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONSOLIDATED EDISON CO. OF NEW YORK, et al. Plaintiffs	:	
v.	:	Civil Action Nos. 96-0225,
HAZEL R. O'LEARY, SECRETARY ENERGY, UNITED STATES, et al. Defendants	:	95-0698 (HHG)

Filed Feb. 29, 1996. Clerk, U.S. District Court, District Of Columbia

MEMORANDUM AND ORDER

This case is currently before the Court on Plaintiffs' motion for a preliminary injunction. Plaintiffs seek a preliminary injunction prohibiting the defendants from distributing funds recovered by the Department of Energy ("DOE") for crude oil overcharges to the United States Treasury and the States of the United States. As the Court finds that plaintiffs lack standing to challenge DOE's distribution of crude oil overcharges,

plaintiffs' motion for a preliminary injunction will be denied and the underlying and related cases will be dismissed.

In 1970, Congress passed the Economic Stabilization Act ("ESA") in an attempt to control inflation. Section 203 of the ESA authorized the President to issue orders and regulations to stabilize prices. Section 209 of the ESA authorized the courts to order restitution of funds received in violation of any such order or regulation. In addition, Section 210 of the ESA allowed a person suffering a legal wrong because of a violation of price regulations to bring a private action against the violator.

In their motion for a preliminary injunction, plaintiffs seek an order enjoining DOE from distributing escrow funds recovered pursuant to DOE's settlement with Occidental Petroleum that the 20 percent set-aside of crude oil refunds for individual claimants has proven insufficient to satisfy the claims of all such claimants, and that if they succeed on their underlying claim, they and others similarly situated will be entitled to more than 20 percent of the Occidental settlement fund to make up for the fact that they have been under-compensated in past settlement distributions.

This matter was last before the Court on February 8, 1996, for a hearing on plaintiffs' motion for a temporary restraining order.

Based on the government's representations to the Court that the Occidental funds would not be distributed until at least March 1, 1996, the Court took no action at that time.[1]

The defendants contend that plaintiffs lack standing to bring their claims. As there is no statutory right of review afforded to plaintiffs, the plaintiffs must show that they fall within the zone of interests meant to be protected by the statutory scheme. Air Courier Conference of America v. American Postal Workers Union, 498 U.S. 517, 523 (1991). It is not sufficient for petitioners to be merely incidental beneficiaries. Id. at 524.

The purpose of an ESA Section 209 proceeding such as that at issue here is to enforce public rights and to ensure the enforcement of DOE's administrative regulations on a national scale. Payne 22 Inc. v. United States, 762 F.2d 91, 95 (TECA

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[1]Certain States have moved to intervene in this action. Those States are not entitled to intervene as a matter of right under Fed. R. Civ. P. 24(a) because their interests are similarly represented by States already in the action. However, the Court is allowing permissive intervention pursuant to Fed. R. Civ. P. 24(b) since the petitioning States have a real economic interest in the outcome of this matter.

1985). This purpose differs from that of ESA Section 210 which expressly authorizes a private party to bring its own action against the overcharging party in order to recover any overcharges it may have suffered. As such, it seems clear that plaintiffs are not within the zone of interests meant to be protected by Section 209.

A long line of cases follows this reasoning, holding that a claimant to a DOE escrow has no standing to challenge DOE's distribution of funds to third parties. Payne 22, Inc. v. United States, 762 F.R.D. 91, 93 (TECA 1985); Consolidated Edison Co. v. Herrington, 752 F.Supp. 1082, 1086 (D.D.C. 1990); United States v. Missouri Self Service Gas Co., 671 F.Supp. 1232, 1239-40 (W.D. Mo. 1987). Plaintiffs claim that these cases are distinguishable because they address challenges to the distribution of funds to third parties, whereas here plaintiffs challenge the allocation of recovered funds. This distinction is superficial. A challenge to the allocation of refunds held in escrow is simply another way of phrasing a challenge to the distribution of such funds to third

parties, here the States and the federal government.[2]

On this basis, the Court finds that plaintiffs, who rather than choosing to pursue their private right of motion under ESA Section 210, opted to take a share of the funds recovered by DOE under its ESA Section 209 proceedings, do not have standing to assert their claims, all of which amount to a challenge to DOE's distribution of overcharge funds.

Accordingly it is this 29th day of February, 1996,

ORDERED that the motion of Delaware, Hawaii, Illinois, Kansas, Nebraska, Nevada, North Carolina, Rhode Island, and West Virginia, the Territory of Guam and the Virgin Islands to intervene is GRANTED; and it is further

ORDERED that plaintiffs' motion for a preliminary injunction be and hereby is DENIED; and it is further

---

[2]Plaintiffs' argument that the Federal Circuit's ruling in Mullins v. DOE, 50 F.3d 990 (Fed. Cir. 1995) is now controlling on the issue of claimant standing is similarly unavailing. Although the Mullin court did review DOE's allocation of settlement funds between crude oil and refined oil products, it did not address the issue of standing.

ORDERED that case No. 96-0225 is dismissed; and it is further

ORDERED that case No. 95-0698 is dismissed.

HAROLD H. GREENE
United States District Judge

United States Court of Appeals
for the Federal Circuit
96-1248, -1257

CONSOLIDATED EDISON COMPANY OF NEW YORK, LONG ISLAND LIGHTING COMPANY, ORANGE AND ROCKLAND UTILITIES, PACIFIC GAS AND ELECTRIC COMPANY, SAN DIEGO GAS AND ELECTRIC COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, CHAMPION INTERNATIONAL CORPORATION, FEDERAL PAPER BOARD COMPANY, INC., INTERNATIONAL PAPER COMPANY, and WEYERHAUSER COMPANY,
Plaintiffs-Appellants,

v.

Hazel R. O'Leary, SECRETARY OF ENERGY, and George B. Breznay, DIRECTOR, OFFICE OF HEARINGS AND APPEALS, DEPARTMENT OF ENERGY,
Defendants-Appellees,

and

STATES OF ALABAMA, CALIFORNIA, CONNECTICUT, IDAHO, INDIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, OHIO, SOUTH DAKOTA, VERMONT, WISCONSIN, and WYOMING,
Defendants-Appellees,

and

STATES OF DELAWARE, HAWAII, ILLINOIS, KANSAS, NEBRASKA, NEVADA, NORTH CAROLINA, RHODE ISLAND, and WEST VIRGINIA, and TERRITORY OF GUAM AND THE VIRGIN ISLANDS,

Defendants-Appellees.

O R D E R

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED, and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on August 22, 1997.

FOR THE COURT,
JAN HORBALY, CLERK

By_____
Alex Van Veen
Staff Law Clerk

Dated: August 15, 1997

Filed Aug. 15, 1997
U.S. Court of Appeals
For the Federal Circuit
Jan Horbaly, Clerk

"Sec. 209. Injunctions and other relief

"Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

"Sec. 210. Suits for damages or other relief

"(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a

declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

"(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

"(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

"(2) not less than $100 or more than $1,000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: *Provided*, That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within

ninety days from the date of the presentation of such claim.

"(c) For the purposes of this section, the term 'overcharge' means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

"Sec. 211. Judicial review

"(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code.

EMERGENCY PETROLEUM ALLOCATION
ACT OF 1973

Sec. 5(a)(1) Except as provided in paragraph (2), (A) sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973) shall apply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b)) and 213 of such Act shall apply to functions under this chapter to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

Sec. 7192. Judicial review

(a) Agency action

Judicial review of agency action taken under any law the functions of which are vested by law in, or transferred or delegated to the secretary, the Commission or any officer, employee, or component of the Department shall, notwithstanding such vesting, transfer, or delegation, be made in the manner specified in or for such law.

PETROLEUM OVERCHARGE DISTRIBUTION AND RESTITUTION ACT OF 1986

Sec. 4502. Identification and disbursement of restitutionary amounts

(a) In general

(1) Subject to paragraph (2)--

(A) all rulings, policies, or other statements (including any administrative order or settlement agreement) issued after October 21, 1986, by any office, official, or employee of the Department of Energy; and

(B) all orders, including declaratory judgments, issued by any court after October 21, 1986, shall be consistent with the provisions of this chapter.

(2) Nothing in this section shall affect the settlement approved on July 7, 1986, in In Re: the Department of Energy Stripper Well Exemption Litigation M.D.L. No. 378, in the United States District Court for the District of Kansas.

(b) Disbursement of restitutionary amounts as direct restitution to injured persons

(1) The Secretary shall, through the Office of Hearings and Appeals of the Department of Energy, conduct proceedings expeditiously in accordance with subpart V

regulations for the purpose of, to the maximum extent possible--

(A) identifying persons or classes of persons injured by any actual or alleged violation of the petroleum pricing and allocation regulations issued pursuant to the Emergency Petroleum Allocation Act of 1973 [15 U.S.C.A. §751 et seq.] or the Economic Stabilization Act of 1970 [12 U.S.C.A. §1904 note];

(B) establishing the amount of any injury incurred by such persons; and

(C) making restitution, through the disbursement of amounts in the escrow accounts described in subsections (b) and (d) of section 4501 of this title, to such persons.

(2) In conducting such proceedings, the Secretary shall take into consideration the reports released pursuant to several orders of the applicable Federal district court in In Re: the Department of Energy Stripper Well Exemption Litigation, M.D.L. No. 378 in the United States District Court for the District of Kansas.

(c) Determination of excess amount to be used for indirect restitution

(1) Within 45 days after October 21, 1986, in the case of fiscal year 1987, and within 45 days after the beginning of each

fiscal year after fiscal year 1987, the Secretary shall, using the best information available to the Secretary, determine and publish (along with a justification thereof) in the Federal Register the amount held in the escrow account described in subsections (b) and (d) of section 4501 of this title that is in excess of the amount that will be needed to make restitution to persons or classes of persons in accordance with subsection (b)(1) of this section and to meet other commitments of such accounts (including the requirements of section 155 of Public Law 97-377). In making such determination, the Secretary shall give primary consideration to assuring that at all times sufficient funds (including a reasonable reserve) are set aside for making such restitution and meeting such other commitments.

(2) The Secretary shall make public the information referred to in the first sentence of paragraph (1).

(d) Disbursement of excess amount as indirect restitution for energy conservation programs

(1) After the publication of the determination of an excess amount under subsection (c) of this section for a fiscal year, the Secretary shall promptly provide for the disbursement of a portion or all of such excess amount for use in energy conservation

programs. The amount so disbursed for a fiscal year shall be the smaller of--

(A) $200,000,000 minus the amount of Federal funds appropriated for energy conservation programs for such fiscal year; or

(B) the amount determined under subsection (c) of this section to be the excess amount for such fiscal year.

(2) After determining the amount to be made available under paragraph (1), the Secretary shall apportion such amount among each of the energy conservation programs in a manner that will provide funding under this chapter for the fiscal year concerned for each of such programs in the same proportionate amount that was provided for each of the programs by the congress for fiscal year 1986. The Secretary shall then make available each amount apportioned for use under an energy conservation program in the same manner, to the same extent, under the same rulings and regulations, and for the same uses that Federal appropriated funds are made available and used under such program.

(3) The Secretary shall require that amounts made available under this subsection are used to supplement, and not supplant, funds otherwise available for energy conservation activities under Federal or State law.

(Pub. L. 99-509, Title III, §3003, Oct. 21, 1986, 100 Stat. 1882.)

FEDERAL COURTS ADMINISTRATION ACT
OF 1992

Sec. 102. Abolition of Temporary Emergency Court of Appeals

(a) APPEALS UNDER ECONOMIC STABILIZATION ACT--Section 211 of the Economic Stabilization Act of 1970 (Public Law 91-379; 84 Stat. 799) is amended by striking subsections (b) through (h) and inserting the following:

"(b) Appeals from orders or judgments entered by a district court of the United States in cases and controversies arising under this title shall be brought in the United States Court of Appeals for the Federal Circuit if the appeal is from a final decision of the district court or is an interlocutory appeal permitted under section 1292(c) of title 28, United States Code."

(b) JUDICIAL REVIEW OF EMERGENCY ORDERS UNDER THE NATURAL GAS POLICY ACT--Section 506(c) of the Natural Gas Policy Act of 1978 (15 U.S.C. 3416(c)) is amended--

(1) in the first sentence, by striking "the Temporary Emergency Court of Appeals, established pursuant to section 211(b) of the Economic Stabilization Act of 1970, as amended," and inserting "the United States Court of Appeals for the Federal Circuit"; and

(2) by striking "Temporary Emergency Court of Appeals" each place

it appears and inserting "United States Court of Appeals for the Federal Circuit."

(c) CONFORMING AMENDMENTS--Section 1295(a) of title 28, United States Code, is amended--

(1) by striking "and" at the end of paragraph (9);

(2) by striking the period at the end of paragraph (10) and inserting a semicolon; and

(3) by adding at the end of the following new paragraphs:

"(11) of an appeal under section 211 of the Economic Stabilization Act of 1970;

"(12) of an appeal under section 5 of the Emergency Petroleum Allocation Act of 1973;

"(13) of an appeal under section 506(c) of the Natural Gas Policy Act of 1978; and

"(14) of an appeal under section 523 of the Energy Policy and Conservation Act."

(d) ABOLITION OF COURT--The Temporary Emergency Court of Appeals created by section 211(b) of the Economic Stabilization Act of 1970 is abolished, effective 6 months after the date of the enactment of this Act.

DOCKET NO. 97-794

Supreme Court, U.S.
FILED
JAN 12 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CONSOLIDATED EDISON COMPANY OF NEW YORK, LONG ISLAND LIGHTING COMPANY, ORANGE AND ROCKLAND UTILITIES, PACIFIC GAS AND ELECTRIC COMPANY, SAN DIEGO GAS AND ELECTRIC COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, CHAMPION INTERNATIONAL CORPORATION, FEDERAL PAPER BOARD COMPANY, INC., INTERNATIONAL PAPER COMPANY, and WEYERHAUSER COMPANY,

Petitioners,

v.

FEDERICO PENA, SECRETARY OF ENERGY, and GEORGE B. BREZNAY, DIRECTOR, OFFICE OF HEARINGS AND APPEALS, DEPARTMENT OF ENERGY,

and

STATES OF ALABAMA, CALIFORNIA, CONNECTICUT, IDAHO, INDIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, OHIO, SOUTH DAKOTA, VERMONT, WISCONSIN, and WYO[illegible]G,

and

STATES OF DELAWARE, HAWAII, ILLINOIS, KANSAS, NEBRASKA, NEVADA, NORTH CAROLINA, RHODE ISLAND, and WEST VIRGINIA, TERRITORY OF GUAM and THE VIRGIN ISLANDS,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the Federal Circuit

BRIEF FOR RESPONDENTS STATES OF ALABAMA, et al., IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION

Did the Court of Appeals correctly affirm the District Court's dismissal for lack of standing of petitioners' challenge to a key provision of a court-approved, congressionally-ratified settlement agreement binding on the Department of Energy, where the agreement gave petitioners an opportunity to share in a limited fund established under the agreement for this purpose, petitioners had no legal right to any funds before the agreement, petitioners did not object to the agreement when it was adopted in 1986, and petitioners are now seeking to expand the size of the fund without any basis in law?

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Office of Hearings and Appeals Report on Stripper Well Overcharges, 7 Energy Mgmt. (CCH) par. 90,507 (1985). 7

Statement of Restitutionary Policy of the Department of Energy, 50 Fed. Reg. 27,400 (July 2, 1985), reprinted in, 7 Energy Mgmt. (CCH) par. 90,508 (1985) 7, 8

BRIEF OF RESPONDENTS STATES OF ALABAMA, *et al.*, IN OPPOSITION

Respondents, the States of Alabama, California, Connecticut, Idaho, Indiana, Maryland, Michigan, Mississippi, Montana, Ohio, South Dakota, Vermont, Wisconsin, and Wyoming respectfully oppose the petition of Consolidated Edison, et al., for a writ of certiorari.

COUNTERSTATEMENT OF THE CASE

The Petition for Writ of Certiorari is rife with misstatements of law and fact, all of which attempt to conceal the basic fact about this case which makes it inappropriate for review by this Court. That is, petitioners are attempting to attack a central provision of a court-approved, congressionally-ratified 1986 settlement agreement among the United States Department of Energy ("DOE"), all of the States and territories of the United States, and thousands of private parties. Petitioners chose not to become parties to this agreement, but did not object to its adoption. They benefitted from it by being given an opportunity, previously denied them by court precedent and agency policy, to apply for a share of a portion of funds collected by DOE in connection with the enforcement of its crude oil price control regulations. Now petitioners "seek to strike" (Petition at 8) only the portion of the agreement which specified the size of the benefit conferred upon them, while leaving intact the other elements of that benefit.

The dismissal of this action by the District Court, and its affirmance by the United States Court of Appeals for the Federal Circuit, are absolutely consistent with the decisions of this Court, and with prior decisions of the Courts of Appeals, holding that third parties do not have standing to attack

settlement agreements which are discretionary acts of government agencies, or settlements of which they are beneficiaries, but which do not prejudice their legal rights. Both of these principles apply here to preclude petitioners' suit.

Petitioners are correct that the Federal Circuit, *sua sponte*, supplied another rationale for dismissal apart from the lack of standing relied upon by the District Court. Even if petitioners are correct that in the course of articulating this alternative rationale, the court misapplied certain decisions of this Court, the Federal Circuit judgment is nevertheless correct on the facts here, and the job of this Court "is to review judgments, not to edit opinions."[1] Nothing in the judgment of the Court of Appeals dismissing petitioners' complaints presents the compelling reasons required for invoking this Court's discretionary review.[2]

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[1] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 823 (1985)(Stevens, J., concurring in part and dissenting in part). See also, Helvering v. Gowran, 302 U.S. 238, 245 (1937)("In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason"). The Federal Circuit itself has recently reaffirmed this principle. Koyo Seiko Co., Ltd. v. United States, 95 F.3d 1094, 1099 (Fed. Cir. 1996).

[2] Petitioners' second complaint before the District Court challenged the distribution of funds from the settlement of a particular crude oil enforcement case. See Federal Circuit Opinion, Petition at 19a. Petitioners have not addressed or challenged the dismissal of this complaint in their Petition for Writ of Certiorari. The Federal Circuit affirmed the dismissal of this claim because it was an attack on a settlement agreement, "a matter committed to the discretion of the agency," *id.*, at 21a, precisely the basis it could and should have used

In order to understand the nature of petitioners' claims, and the issues that would be under review if certiorari were granted, it is necessary to understand some basic historical facts about DOE's distribution of crude oil restitutionary funds and the origin of the reserve of a maximum of 20% of such funds for the individual refund proceedings in which the petitioners are refund applicants.

Under the Economic Stabilization Act Amendments of 1971 ("ESA"), sec. 209,[3] and subsequently the Department of Energy Organization Act ("DOEOA"), 42 U.S.C. sec. 7193, the DOE was authorized to bring actions to enjoin and seek restitution for violations of its oil price control regulations. For several years prior to the Final Settlement Agreement ("FSA") in In re Department of Energy Stripper Well Exemption Litigation, M.D.L. 378, ("Stripper Well"),[4] DOE's Office of Hearings and Appeals ("OHA") had conducted restitutionary proceedings pursuant to its regulations found at 10 C.F.R. Part 205, Subpart V ("Subpart V proceedings") to distribute funds collected in connection with DOE's enforcement activities

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to dismiss the complaint at issue here.

[3] Pub. L. No. 92-210, 85 Stat. 743 (1971), former 12 U.S.C. sec. 1904 note. The relevant ESA provisions were later incorporated into the Emergency Petroleum Allocation Act of 1973 ("EPAA") , Pub. L. No. 93-159, 87 Stat. 627, 15 U.S.C. secs. 751-760, and the DOEOA, Pub. L. No. 95-91, 42 U.S.C. sec. 7101, *et seq.*

[4] The FSA was approved by the Kansas District Court in Stripper Well, 653 F. Supp. 108 (D. Kan. 1986). The FSA is reprinted, without its exhibits, in the Appendix submitted to the Court of Appeals (hereinafter "App."), pp. 85-110.

pursuant to ESA sec. 209 and the DOEOA. OHA had developed a set of standards, and a body of administrative case law, concerning refunds to claimants in cases involving regulatory violations in the sale of petroleum products (i.e., the refined products derived from crude oil, as contrasted with the crude oil itself). In some of these cases, OHA had ordered restitutionary distributions of refunds to the States of affected consumers, for use in their energy programs.[5]

However, while Subpart V proceedings had been initiated for some crude oil funds, OHA had never developed standards for determining eligibility for distributions in those cases, and had never ruled on any refund applications.[6] OHA had been unable to develop refund procedures in crude oil cases because of the effect of DOE's Entitlements Program, which operated to spread excessive costs on crude oil first to all the nation's refiners, then down the distribution chain, eventually to all of the nation's ultimate consumers of petroleum products.[7]

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[5] *See, e.g.*, Highland Petroleum, Inc. v. DOE, 798 F.2d 474, 476 (TECA 1986).

[6] See Allerkamp, 17 DOE (CCH) par. 85,079 at 88,170 (1988); "Notice Explaining Crude Oil Refund Procedures," 52 Fed. Reg. 11,737 (April 10, 1987), *reprinted in*, 7 Energy Mgmt. (CCH) par. 90,512 at p. 90,708 (1987).

[7] For an explanation of the operation of the Entitlements Program, see Union Oil Co. v. DOE, 688 F. 2d 797, 802 (TECA 1982), *cert. denied*, 459 U.S. 1202 (1983); United States v. Exxon Corp., 773 F.2d 1240, 1284-84 (TECA 1985), *cert. denied*, 474 U.S. 1105 (1986).

Partially in response to this impasse in the distribution of crude oil funds, Congress in 1982 directed a one time restitutionary distribution of $200 million, much of which derived from crude oil funds, to the States for specified energy-related programs to benefit their citizens who were consumers of petroleum products and thus were injured by violations of the oil price control regulations.[8] During the same period, DOE directed that certain crude oil restitution received as a result of consent orders with violators be paid to the U.S. Treasury or be used for in kind contributions to the federal Strategic Petroleum Reserve.[9]

In 1983, the United States District Court for the District of Columbia held that due to the workings of the Entitlements Program, it was impossible in a crude oil case to "trac[e] ... the overcharges to their ultimate victims and ... calculat[e] ... the damages suffered by each." United States v. Exxon Corp., 561 F. Supp. 816, 853 (D.D.C. 1983), *aff'd*, 773 F.2d 1240 (TECA 1985), *cert. denied*, 474 U.S. 1105. The court specifically rejected the option of creating an escrow fund for individual claimants, *id.*, 561 F. Supp. at 855, and instead ordered that over two billion dollars in crude oil restitution be distributed in accordance with the congressional (Warner Amendment) model, *i.e.*, to the States for energy-related programs. *Id.*, 561 F. Supp. at 856. A similar resolution of a crude oil case,

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[8] Section 155 of the Further Continuing Appropriations Act of 1983, Pub. L. 97-377, 96 Stat. 1830, 1919 (1982) ("Warner Amendment").

[9] See, e.g., Consent Order with Standard Oil Co. of Calif., 46 Fed. Reg. 52,221 (Oct. 26, 1981).

directing the funds to state energy programs, was also reached by an Oklahoma District Court, and was likewise affirmed by the Temporary Emergency Court of Appeals ("TECA").[10] United States v. Sutton, 795 F.2d 1040, 1063-64 (TECA 1986), *cert. denied*, 479 U.S. 1030 (1987).

During the time that the appeals in the Exxon and Sutton cases were pending, the court in the Stripper Well case was faced with the distribution of over one billion dollars of crude oil refunds it held in escrow. The District Court judge stated that while he tended to agree with the conclusion in the Exxon case, he could not be certain that it was impossible to identify any injured parties, and referred to OHA the task of attempting to do so. Stripper Well, 578 F. Supp. 586, 594-97 (D. Kan. 1983). After extensive hearings, OHA submitted a report to the court which estimated the level of absorption of crude oil overcharges on an industry-wide basis at the refiner level of the petroleum industry, but concluded that it was impossible to trace the economic harm to particular firms or

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[10] TECA was established by Congress in Sec. 211(b)(2) of the ESA, later incorporated into sec. 5(a)(1) of the EPAA, as the court with exclusive jurisdiction over appeals from the district courts in cases or controversies arising under the ESA or under regulations or orders issued thereunder. In accordance with the Federal Courts Administration Act of 1992, Pub. L. 102-572, 106 Stat. 4506, TECA was dissolved as of April 29, 1993, and its jurisdiction transferred to the United States Court of Appeals for the Federal Circuit. TECA had interpreted its statutory authorization as "issue jurisdiction," meaning that it generally decided only the ESA/EPAA issues in a case. The Federal Circuit adopted TECA precedent and practice on jurisdictional matters, Texas American Oil Corp. v. DOE, 44 F.3d 1557, 1563-64 (Fed. Cir. 1995), and on substantive matters as well. *Id.* at 1561.

individuals.[11] DOE submitted a separate statement to the court, which concluded that, based on the OHA Report, "individual proof of harm is ... shown to be impossible,"[12] and thus recommended to the court that Congress be allowed to direct the appropriate distribution of crude oil funds. If Congress had not acted by the fall of 1986, DOE recommended that the funds be placed in the general fund of the U.S. Treasury. *Id.*, at p. 90,646.

Subsequently, negotiations began among the DOE, the fifty States, and groups representing various levels of the petroleum industry (refiners, resellers, and retailers), as well as representatives of several large groups of end users of petroleum products, including utilities and surface transporters, to settle globally not only the Stripper Well case but other pending litigation regarding the oil price control program and the distribution of all future crude oil funds. As is evident from the foregoing history, at the time of these negotiations, both TECA's rulings and DOE's policy had confirmed that individual claims proceedings in crude oil cases were neither legally required nor administratively practicable, and had instead relied on indirect restitution through governmental distributions to compensate the consuming public.

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[11] "OHA Report on Stripper Well Overcharges," *reprinted in*, 7 Energy Mgmt. (CCH) par. 90,507 at p. 90,639, 90,641(1985). Thus, Petitioners' claim that the OHA study eliminated the impossibility of determining individual injury in crude oil cases, Petition at 5, n.2, is incorrect.

[12] Statement of Restitutionary Policy of the Department of Energy, 50 Fed. Reg. 27,400 (July 2, 1985), *reprinted in*, 7 Energy Mgmt. (CCH) par. 90,508 (1985) at p. 90,644.

The negotiations culminated in the Final Settlement Agreement approved by the Stripper Well court in 1986. In keeping with prior congressional action, case law and DOE policy, the FSA directed that the bulk of crude oil funds be distributed to the state governments for their energy programs and to the U.S. Treasury, as restitution to the nation's many millions of household and business consumers of petroleum products. The States and the federal government received substantial funds from the Stripper Well escrow, and also were to receive at least 40% each of all current and future DOE-held crude oil funds.

Notwithstanding TECA's prior rulings and DOE's 1985 Statement of Restitutionary Policy, both of which rejected an individual refund process in favor of governmental distributions, the FSA also provided that OHA could "reserve a reasonable portion of [crude oil] funds... to satisfy potentially provable claims of identifiable injured claimants ..., *but such reserve shall not exceed 20 percent of the monies in such proceeding.*" FSA IV.B.6, App. 106 (emphasis supplied). The 80% or more of DOE-held crude oil funds not so reserved was to be distributed, as soon as received by DOE, to the States and the federal government, as indirect restitution to all consumers. *Id.*. Nothing in the FSA permitted the 20% reserve to be increased by DOE, although the Agreement did allow the reserve to be adjusted downwards. *Id.*. No allocation formula for those seeking a share of the reserve was established or even mentioned in the FSA.

After court approval of the FSA, as required by FSA IV.B.1, App. 104, DOE published a Modified Statement of

Restitutionary Policy, ("MSRP"),[13] which vacated the prior Statement of Restitutionary Policy submitted to the Stripper Well court. The terms of the MSRP were mandated by the FSA and the court order approving the FSA.[14] The MSRP states:

> This policy will be implemented by equally distributing to the States, and to DOE for deposit in the Treasury, eighty percent of all crude oil funds. The remaining twenty percent will be set aside for claims of direct injury. The balance remaining after the ... [claims] stage is completed will also be paid to the States and DOE.[15]

Subsequently, following notice and comment proceedings, OHA issued a "Notice Explaining Crude Oil Refund Procedures."[16] Consistent with the MSRP, the Notice applies only to the up to 20% of crude oil funds available for distribution by OHA to individual applicants. 7 Energy Mgmt. (CCH) par. 90,512 at p. 90,707. In that Notice, OHA indicated its intention to apply a "volumetric" allocation formula for calculating the crude oil refund applicants' shares of the available funds. *Id.*, at p. 90,711. It is this OHA allocation formula upon which petitioners base their claim on the merits here, claiming that the formula for allotting the 20% reserve

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[13] 51 Fed. Reg. 27,899 (August 4, 1986), *reprinted in*, 7 Energy Mgmt. (CCH) par. 90,508A (1986).

[14] Stripper Well, *supra*, 653 F. Supp. at 114; MSRP, 7 Energy Mgmt. (CCH) par. 90,508A at 90,674-5: "This Statement is part of the implementation of the terms of the [FSA] Agreement...".

[15] *Id.*, at pp. 90,647-6 - 90,647-7.

[16] *Supra*, n. 6.

somehow requires that more than 20% of crude oil funds be distributed to individual crude oil applicants, at the expense, of course, of the 80% required to be distributed as indirect restitution through the States and the federal government.

In fact, however, ever since the allocation formula was established, DOE has recognized that the formula is intended solely to allocate the fund available to crude oil applicants, i.e., the maximum of 20% required by the FSA, and cannot operate to expand that amount in violation of the FSA. See, *id.*, at pp. 90,710 and 90,711, n. 1.

Moreover, TECA approved OHA's allocation formula for the claims fund as a permissible exercise of DOE's discretion, as long as it operated as OHA intended, *i.e.*, within the 20% reserve. Stripper Well, 857 F.2d 1481 (TECA 1988). TECA stated:

> Under the FSA only 20 per cent of moneys in other [than the Stripper Well] escrow accounts are available for distribution in these proceedings....
>
> What the States are entitled to under the FSA is secure. All that OHA's formula affects is the amount that individual end users will receive in refunds out of the 20 per cent set aside to settle their claims.

Id., 857 F.2d at 1484 (emphasis in original).

REASONS FOR DENYING THE WRIT

I. Petitioners Lack Standing To Attack a Provision of the FSA, Whose Adoption Was an Exercise of DOE's Discretion, and Which Did Not Impair Their Existing Rights, But Only Conferred a Benefit Upon Them

The District Court and the Federal Circuit reached the correct result when they dismissed this case. Petitioners are attempting to attack a term of a court-approved and congressionally-recognized[17] settlement agreement, which provided them a benefit to which they had no legal entitlement. Petitioners' attempted attack on the FSA is barred, both 1) because it challenges a settlement entered into as an exercise of DOE's discretionary authority to settle enforcement matters, including the distribution of restitutionary proceeds, and 2) because third parties have no standing to attack a settlement agreement which does not impair their existing rights. The FSA does not do so.

First, the dismissal of these actions implements the holdings of Heckler v. Chaney, 470 U.S. 821 (1985) and its progeny, *e.g.*, New York State Dept. of Law v. FCC, 984 F.2d 1209 (D.C. Cir. 1993), that the dismissal or settlement of agency enforcement proceedings without a ruling on the merits

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[17] *See*, Petroleum Overcharge Distribution and Restitution Act of 1986 ("PODRA"), 15 U.S.C. sec. 4501 *et seq.*, at secs. 4501(c)(2) and 4502(a)(2).

is unreviewable, because there is no "law to apply" to such decisions, which are akin to "prosecutorial discretion."[18]

The Federal Circuit has explicitly applied this principle in an oil price control case involving a challenge to OHA's decision as to how to apportion refund monies. Mullins v. DOE, 50 F.3d 990 (Fed. Cir. 1995). The Federal Circuit rejected the challenge to OHA's decision, holding that

> the call regarding whether to settle and on what terms nevertheless would remain one peculiarly the province of the executive, and not the judiciary. Much like the decisions of prosecutors regarding who to prosecute and who not, some decisions simply do not lend themselves to traditional notions of judicial review.

50 F.3d at 993 (footnote omitted).

Second, as non-parties who are benefitted by the FSA, petitioners have no standing even to enforce the FSA, much less attack it. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 750 (1975). *See also*, Rafferty v. NYEX Corp, 60 F.3d 844 (D.C. Cir. 1995)(Unless a government consent decree

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[18] Of course, a settlement agreement or other arguably discretionary agency action may be challenged (by a proper party, at an appropriate time) on the ground that it violates a constitutional, statutory or regulatory command, or other legal obligation, in which case there obviously would be "law to apply." *E.g.*, Davis Enterprises v. EPA, 877 F.2d 1181, 1185 (3rd Cir. 1989); Edison Electric Institute v. EPA, 996 F.2d 326, 333 (D.C. Cir. 1993). Petitioners, however, made no such timely challenge to the FSA, and have in fact attempted to disguise the fact that they are attacking the FSA at all. See Part II, *infra*.

stipulates that it may be enforced by a third party, only the parties to the decree may seek enforcement of it.)[19] A third party is "aggrieved" by a settlement agreement so as to confer standing to attack the settlement only if "its substantive provisions unlawfully infringed upon the rights of the complainant." Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479, 484 (6th Cir. 1985), *aff'd sub nom*, Firefighters v. Cleveland, 478 U.S. 501 (1986).

Petitioners may not attack the FSA because it did not impair any existing rights they had. The FSA, *for the first time*, offered individual petroleum product users who were not parties to the FSA,[20] such as the petitioners, the opportunity to apply for a share of a stated portion of the funds collected by DOE in crude oil cases. Prior to the FSA, TECA had ruled that such an opportunity was neither legally required nor administratively practicable.[21] As the District Judge noted when he approved

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[19] The FSA specifically provides that no enforcement rights are conferred on non-parties. FSA VI.B, App. 109.

[20] The non-governmental parties to the FSA all received distributions from the Stripper Well escrow and waived the right to any refunds in the individual claims process to be established for the 20% reserve. Stripper Well, 653 F. Supp. at 114.

[21] Petitioners claim that Texas American Oil Corp. v. DOE, *supra*, holds that PODRA "eliminated the precedent of ... settlements" such as Exxon where "DOE had distributed refunds to the States." Petition at 6-7, n. 3. To the contrary, Texas American states that PODRA reflects the disposition in Exxon in directing "the major portion of the ESA section 209 recovery ... to the states and the general fund of the United States Treasury." 44 F.3d at 1568. In any event, Exxon was not a settlement in which DOE distributed funds to the

the FSA, but for the Agreement, he could have "direct[ed] all of the funds to the United States Treasury and the States." Stripper Well, *supra*, 653 F. Supp. at 117. Prior to the FSA, DOE had never granted a single individual refund from crude oil funds, and its policy was either to allow Congress to legislate the disposition of such funds, or to make governmental distributions as indirect restitution.

Thus, the policy adopted by DOE in accordance with the FSA burdened no existing rights of petitioners, but only conferred a benefit upon them. It gave them something they never had before, as to which they had no legal entitlement, and defined both the amount of the available fund and the procedures for obtaining a share of it. Petitioners have no standing to attack it.

TECA has applied these principles in numerous cases, some of which were relied upon by the District Court in denying standing here, to hold that private third parties do not have standing to attack settlements of DOE oil price control enforcement proceedings, even where they are potential distributees of the settlement funds. E.g., Payne 22, Inc. v. United States, 762 F.2d 91, 93-94 (TECA 1985); Highland Petroleum v. DOE, *supra*, 798 F.2d at 477, 478 ("the general rule [is] that non-parties may not challenge or enforce consent orders directly or in collateral proceedings.... [I]nvalidat[ion of] a term of the consent order [would be an] intolerable result"); Midwest Petroleum v. DOE, 760 F.2d 287, 290 (TECA

States, but a court judgment in which the court determined to achieve restitution entirely through the States, to the exclusion of any claims process whatsoever.

1985)("The mere fact that the option [provided by the consent order] was not as favorable to plaintiffs as they would have wished ... does not mean they suffered any loss as a result of the Consent Order.")

Additionally, even apart from these barriers to this case, petitioners, who chose not to participate in the FSA nor to object to the 20% limit, cannot bring a collateral challenge a decade later.[22] The States and the federal government gave up their claims to 100% of crude oil funds, and allowed thousands of other parties to receive funds from the Stripper Well escrow, in part in return for the guarantee that they would receive at least 40% each of future crude oil funds collected by DOE. Changing one of the Agreement's essential terms now to reduce the governmental shares would irrevocably upset the balance struck in the Agreement, impermissibly disturbing the finality of the Stripper Well court's judgment. EEOC v. Pan American World Airways, Inc., 897 F.2d 1499, 1509 (9th Cir. 1990), *cert. denied*, 498 U.S. 815 (potential parties who chose not to participate in lawsuit have no standing to challenge the terms of

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[22] The FSA was subject to repeated public scrutiny and comment prior to its adoption by the Kansas District Court, Stripper Well, *supra*, 653 F. Supp. at 118, 119, and no one objected to the 20% limitation. All of the petitioners were members of one of the end-user groups eligible for refunds from the Stripper Well escrow itself under the Agreement. The utilities, for example, could have obtained funds from the utility escrow. *Id.*, 653 F. Supp. at 112; FSA II.B.g. They obviously decided to forego their allotted shares under the FSA in order to claim in the crude oil Subpart V proceedings, knowing that those proceedings were limited by the FSA to 20% of crude oil funds. They did not attempt to intervene in the Stripper Well proceedings, or even submit comments to the court, in order to protest the size of the reserve.

the settlement agreement); United States v. Boch Oldsmobile, Inc., 909 F.2d 657, 661 (1st Cir. 1990)("alteration of the consent decree... [three years after its entry] is inconsistent with the principle of finality of judgments"); *cf.*, Ackerman v. United States, 340 U.S. 193, 198 (1950)("There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.").[23]

In sum, the judgment in this case, dismissing petitioners' attempt to strike the FSA's 20% limit for the reserve created for individual crude oil applicants, is entirely consistent with the precedents of this Court, the Circuit Courts of Appeals, and of TECA, the specialized court created by Congress to rule on actions under the oil price control program.

II. The Petition Misstates The Relevant Facts and Law.

The Petition makes several misstatements of fact and law, as well as crucial omissions of important facts and precedents, which conceal the basic truth about this case which makes it inappropriate for Supreme Court review.

First, and most crucial, petitioners have failed to disclose that the limitation to a maximum of 20% of crude oil funds to be made available in the DOE individual claims process was mandated by the FSA, to which DOE was bound and which was approved by the Stripper Well court and recognized by Congress. Instead, petitioners claim that the "sole basis" of the 20% limitation was an "estimate" by the States and DOE which

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[23] The FSA has a stronger claim to finality even than the usual court judgment, since it was also endorsed by Congress in PODRA.

has been "proven wrong." Petition at 8-9. In fact, the plain language of the FSA, as recognized by DOE itself as well as TECA (see p. 10, *supra)*, makes the 20% limit an absolute cap on the amount that is available for distribution to individual claimants.

By claiming that the 20% limit was a mere "estimate," petitioners attempt to conceal the fact that they are attacking a mandatory term of a court-approved settlement agreement.

Second, petitioners claim that the initial allocation formula developed by DOE to apportion the then-available funds from the 20% reserve gave them an entitlement to more than the 20% reserve. Petition at 3-7. As described above, p. 10, however, DOE always intended the formula to operate within the 20% mandated by the FSA, and TECA approved the formula on that basis.[24]

Rather than attempting to enforce a DOE policy (the allocation formula), in fact petitioners are attempting to frustrate DOE policy adopted pursuant to a mandatory term of a court-approved settlement agreement to which they did not object, and upon which their entire claim to any funds depends.

Next, petitioners contend that PODRA supports their claim. Petition at 6, 25-26. Petitioners, however, fail to disclose that PODRA applies exclusively to funds *not* governed

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[24] Petitioners cite the TECA case (Stripper Well, 857 F.2d 1481 (TECA 1988)) which unequivocally established that the DOE formula could not expand the 20% reserve, but fail to mention that aspect of TECA's ruling. Petition at 7.

by the Stripper Well Agreement, *i.e.*, petroleum product, as opposed to crude oil, funds. See PODRA, 15 U.S.C. secs. 4502(a)(2) and 4501(c)(2); Getty Oil v. DOE, 865 F.2d 270, 276 (TECA 1988)(footnote omitted):

> PODRA dictates the method of distribution of funds covered by the Act. The legislation itself specifically excludes from its coverage any funds governed by the Stripper Well agreement.

Thus, the reality is that PODRA, which excludes funds governed by the FSA from its coverage, can in no way support petitioners' claims on the merits or supply them with a cause of action or standing. On the contrary, PODRA supplies a congressional endorsement and ratification of the Stripper Well Agreement, which, of course, limits the reserve for individual claimants to a maximum of 20% of crude oil funds.

III. Petitioners' Speculation as to the Application of the Federal Circuit's Rationale in Future Cases Does Not Warrant This Court's Review

As we have shown, the result reached by the Federal Circuit in this case, dismissing petitioners' claims, was correct and consistent with all relevant precedent. Petitioners argue, however, that the Federal Circuit's rationale supporting dismissal might be applied in future cases to achieve results which are legally erroneous and inconsistent with existing precedent. Petition at 16-18. An incorrect rationale for a correct decision is not cause to invoke this Court's discretionary review, see p. 2 and n. 1, *supra*, and speculation as to how that rationale might be applied to reach wrong results in future cases does nothing to aid petitioners' case. If and when such future purported miscarriages of justice occur, this Court can decide,

in the context of a real, concrete controversy, whether review is warranted in such a case.

IV. There Is No Conflict Between the Decision Here and Prior Decisions of the Lower Courts

Petitioners incorrectly claim that the decision in this case conflicts with prior decisions of the Federal Circuit, TECA and the District Courts. Petition at 18-29. These earlier decisions present entirely different issues from those presented in this case, and thus pose no conflict. None of these cases involves, as does this one, an attack on a provision of the court-approved, congressionally-endorsed settlement agreement which governs the DOE crude oil refund process.

Petitioners rely first on purportedly "conflicting" decisions which permit interested parties to participate in administrative enforcement proceedings before DOE, Petition at 19, obviously a totally different issue from petitioners' standing to attack a term of a court-approved settlement agreement which conferred upon them a new benefit.

Next, petitioners rely on cases which permit applicants for a portion of available DOE restitutionary funds to challenge complete or partial denial of their refund applications. Petition at 20-24, 26-29. Likewise, these cases are not relevant to the claim asserted here. When Subpart V refund applicants challenge decisions on their individual refund applications, they are asking the courts to apply the DOE Subpart V regulations to the facts of their own refund claims, or to determine whether DOE's decisions in Subpart V proceedings are supported by substantial evidence. In some of the cases relied upon by petitioners, refund applicants challenged DOE's interpretation

of certain terms of the FSA as applied to their refund claims. E.g., Burlington Industries v. Watkins, 916 F.2d 722 (TECA 1990). In all such cases, the courts could measure OHA's decisions against appropriate legal standards, *i.e.*, the controlling regulations, the FSA, or the substantial evidence test.

Here, in contrast, petitioners do not rely on any controlling DOE regulations, and do not merely quarrel with DOE's interpretation of a term of the FSA applicable to their own refund applications. Instead, they ask that a necessary term of the FSA be stricken. DOE has no authority to do what petitioners seek. DOE's decision to enter into the FSA was, as the Stripper Well court and Congress found, within its discretion, and DOE was and is required to implement the mandatory terms of this court-approved settlement. Unlike the plaintiffs in the cases they rely upon, these petitioners have not, and cannot, claim that DOE's actions are improper as measured against any applicable legal standard. The only "standard" relied upon by petitioners, the DOE allocation formula, cannot possibly provide petitioners with a claim to more than 20% of crude oil funds, since that formula is required to operate within the 20% reserve.

Finally, petitioners also rely on Texas American, *supra*, for its description of PODRA, which, as discussed above, does not apply to crude oil funds governed by the FSA. Nothing in PODRA, and nothing in Texas American, which concerned solely the bankruptcy classification of certain DOE restitutionary funds, has any relevance here.

In sum, none of the cases cited by petitioners presents a clear conflict which needs to be resolved by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

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CONSOLIDATED EDISON COMPANY OF NEW YORK, *et al.*,

Petitioners,

v.

FEDERICO PENA, SECRETARY OF ENERGY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION FOR THE STATES OF DELAWARE, HAWAII, ILLINOIS, KANSAS, NEBRASKA, NEVADA, NORTH CAROLINA, RHODE ISLAND AND WEST VIRGINIA, THE TERRITORY OF GUAM AND THE VIRGIN ISLANDS

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QUESTION PRESENTED

Whether third-party claimants to crude oil overcharge refunds recovered by the Department of Energy under Section 209 of the Economic Stabilization Act may collaterally attack DOE's distribution of those refunds pursuant to a 1986 court approved settlement agreement.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

No. 97-794

Consolidated Edison Company of New York, *et al.*,

Petitioners,

v.

Federico Pena, Secretary of Energy, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF IN OPPOSITION

The States of Delaware, Hawaii, Illinois, Kansas, Nebraska, Nevada, North Carolina, Rhode Island and West Virginia, the Territory of Guam and the Virgin Islands respectfully submit that the petition for a writ of certiorari of Consolidated Edison Company of New York, *et al.* ("Petitioners") should be denied. The decision of the Court of Appeals is correct and there are no special or important reasons to grant certiorari.

STATEMENT OF THE CASE

A. Factual Background

In 1970 and 1973, respectively, Congress enacted the Economic Stabilization Act ("ESA"), Pub. L. No. 91-379, 84 Stat. 799 (1970), as amended, Pub. L. No. 92-210, 85 Stat. 743

(1971) [last codified at 12 U.S.C. § 1904 note (1976)], and the Emergency Petroleum Allocation Act, Pub. L. No. 93-159, 87 Stat. 27 (1973), authorizing the President, *inter alia*, to impose allocation and price controls with respect to the sale of crude oil and refined petroleum products. Pursuant to that authority, the Department of Energy's predecessor agencies (collectively with the Department of Energy, "DOE") adopted regulations controlling the price of crude oil. *See, e.g.*, 39 Fed. Reg. 1925 (Jan. 15, 1974). DOE subsequently filed hundreds of administrative and judicial enforcement actions for violations of those regulations. The judicial actions were brought pursuant to Section 209 of the ESA, which authorized DOE to recover monies collected in violation of its price control regulations ("overcharges"). *See* Pet. App. 34a (ESA § 209).

In addition to such government actions under Section 209, Section 210 authorized overcharged private claimants to file suit in federal court to recover their overcharges directly. *See* Pet. App. 34a-36a (ESA § 210).

Major disputes arose among the federal and state governments, crude oil refiners, and major industrial, commercial, utility and agricultural users of petroleum products with respect to the appropriate ultimate distribution of overcharges recovered and to be recovered by DOE. *See In re Dep't of Energy Stripper Well Exemption Litigation* ("*M.D.L. No. 378*"), 653 F. Supp. 108, 112-14 (D. Kan. 1986).

M.D.L. No. 378, one of DOE's most significant cases, was settled in 1986. That settlement was the culmination of more than eight years of extensive multidistrict litigation and settlement negotiations, and was entered into by the United States, 56 States and Territories ("56 Jurisdictions"), hundreds of oil companies and hundreds of large industrial, commercial, utility and agricultural claimants to the recovered overcharge funds. *M.D.L. No. 378*, 653 F. Supp. at 109, 112.

The *M.D.L. No. 378* global settlement established the formula for distributing all crude oil overcharges recovered by DOE, in both *M.D.L. No. 378* and all other judicial and administrative proceedings, and has governed the distribution of almost $5 billion in hundreds of overcharge cases. *M.D.L. No. 378* Final Settlement Agreement ("FSA") §§ II.B (App. 18a-33a), IV.A (App. 41a-42a), IV.B.2 (App. 43a-45a), IV.B.6 (App. 46a-47a), approved in *M.D.L. No. 378*, 653 F. Supp. at 112-14.

The FSA provided for the payment of specified sums from the *M.D.L. No. 378* escrow account to third-party claimants. The balance of the *M.D.L. No. 378* escrow account, certain funds then held in escrow by DOE and all future funds recovered in *M.D.L. No. 378* were to be divided equally between the 56 Jurisdictions and the federal government. FSA § II.B.3 (App. 27a-33a); *see also M.D.L. No. 378*, 653 F. Supp. at 112.

The FSA further provided, with respect to all other crude oil overcharges, that a maximum of 20% of future recovered funds would be reserved for the payment of claims by injured third-party claimants, upon proof of purchase, and that the remainder would be distributed equally between the 56 Jurisdictions and the federal government. FSA § IV.B.6 (App. 46a-47a); *M.D.L. No. 378*, 653 F. Supp. at 114.

This agreed formula, which became known as the 40-40-20 formula, was based on estimates, in which Petitioners' counsel concurred, that the "total amount distributed to end-users will probably not exceed 15%." *Getty Oil Co. v. DOE*, 117 F.R.D. 540, 550 (D. Del. 1987), *aff'd*, 865 F.2d 270 (Temp. Emer. Ct. App. 1988); Appellants' Initial Brief in Fed. Cir. at 16. The agreed formula was formally adopted by DOE in its Statement of Modified Restitutionary Policy in Crude Oil Cases, 51 Fed. Reg. 27,899 (Aug. 4, 1986) (App. 57a-70a), and implemented in DOE's Implementation of

Special Refund Procedures, 52 Fed. Reg. 11,737 (Apr. 10, 1987) (App. 71a-99a); *In re Dep't of Energy Stripper Well Exemption Litigation, M.D.L. No. 378*, 857 F.2d 1481, 1483 (Temp. Emer. Ct. App. 1988).

The distributions to third-party claimants were to be calculated on a volumetric basis in proportion to the number of gallons of petroleum products purchased. Neither the ultimate gallonage of petroleum product claims, nor the ultimate amount of overcharge funds to be collected, was or could be known until the submission of all claims and the completion of all proceedings. Thus, DOE faced the choice of periodically and timely distributing recovered overcharges based on estimates, or withholding payments indefinitely. DOE chose to make periodic distributions.

Neither the FSA 40-40-20 formula -- which simply capped the maximum percentage available for distribution to private claimants at 20% -- nor DOE's initial determination of a volumetric refund amount created any right to ultimate recovery of any specific dollar amount of money or to future distributions of a like volumetric amount. *M.D.L. No. 378*, 857 F.2d at 1484 ("All that [DOE's] formula affects is the amount that individual end users will receive in refunds out of the 20 per cent set aside to settle their claims."); *see also* Implementation of Special Refund Procedures, 52 Fed. Reg. at 11,739 (App. 80a) ("the settlement permits only downward adjustment of the reserve from the initial 20 percent figure").

Petitioners' current challenge to the FSA 40-40-20 formula is the most recent in a long line of attempts to expand their share of DOE's Section 209 recoveries. Each such challenge has been rejected by the courts. *See, e.g.*, *Consolidated Edison Co. v. O'Leary*, No. 97-1242, 1997 WL 763045 (Fed. Cir. Dec. 12, 1997); *Consolidated Edison Co. v. Herrington*, 752 F. Supp. 1082 (D.D.C. 1990), *aff'd sub nom. Consolidated Edison Co. v. Watkins*, 927 F.2d 1227 (Temp.

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Petitioners' current challenge is also likely to be their last. DOE's authority to control prices was terminated in 1991. Executive Order No. 12287, 46 Fed. Reg. 9909 (Jan. 28, 1981). DOE's authority to recover overcharges was repealed in 1986, 15 U.S.C. § 4504(a), effective the later of September 30, 1988 or six years after an alleged violation. Thus, no further enforcement actions may be filed. Although a few small administrative proceedings remain open, the issues presented by the petition are unlikely to come before this or any other court at any other time or in any other context.

B. The Proceedings Below

On April 12, 1995, Petitioners filed a three count complaint in the United States District Court for the District of Columbia. Civil Action No. 95 CV-0698. Count I of the complaint sought a declaratory judgment that the allocation of a maximum of 20% of oil overcharge recoveries to private claimants is unlawful. In alternative Counts II and III, Petitioners sought a declaration that overcharge payments to "late-filing" claimants and/or to certain governmental agencies should be excluded from the 20% allocation.

On February 7, 1996, Petitioners filed a second complaint, Civil Action No. 96 CV-00225, seeking to enjoin DOE's scheduled distribution of oil overcharge recoveries obtained from Occidental Petroleum Corporation pursuant to the FSA 40-40-20 formula. The complaint sought to compel distribution of the total overcharges recovered to private claimants rather than to the 56 Jurisdictions or the federal government in accordance with the 40-40-20 formula.

On February 29, 1996, Judge Harold H. Greene denied Petitioners' request for a preliminary injunction and dismissed both complaints for lack of standing to challenge DOE's distribution of oil overcharge funds recovered through Section 209 of the ESA. Pet. App. 25a-30a.

On June 19, 1997, the United States Court of Appeals for the Federal Circuit affirmed the District Court's dismissal of Petitioners' complaints. Pet. App. 1a-22a. The Court held that the complaints failed to state a claim because Petitioners' exclusive remedy was to file private actions for recovery of overcharges pursuant to Section 210 of the ESA and that, therefore, no jurisdictional basis existed for any suit against DOE. Moreover, it found Petitioners' attack on DOE's 40-40-20 allocation of recoveries pursuant to the FSA to be an impermissible challenge to the FSA.

REASONS FOR DENYING THE PETITION

THE FEDERAL CIRCUIT'S DECISION IS CORRECT AND REJECTION OF PETITIONERS' CHALLENGE TO THE 40-40-20 FORMULA RAISES NO SUBSTANTIAL ISSUE FOR REVIEW

The Federal Circuit was correct in holding that Petitioners have no cause of action against DOE, and that Petitioners' challenge of DOE's distribution of recoveries as agreed in the FSA is an impermissible attack on the FSA. Pet. App. 21a. The courts have repeatedly rebuffed the attempts of private parties to interfere with decisions made by DOE in Section 209 enforcement proceedings, including several filed by Petitioners. There is nothing new or novel in Petitioners' current complaint, which at bottom is a collateral attack on "a settlement agreement of historic proportions," *M.D.L. No. 378,* 653 F. Supp. at 109.

ESA Section 209 provides for government enforcement of public rights; it does not provide for the redress of private

injuries. Section 209 does not confer standing on a third-party claimant to challenge a DOE Section 209 recovery action, the settlement of such action or the allocation of proceeds therefrom. ESA Section 210 provides the exclusive private remedy for injuries stemming from oil overcharges. Precedent (often involving Petitioners) has conclusively established that there is no private party standing to challenge any facet of a DOE Section 209 recovery action. *See, e.g.*, *Consolidated Edison Co. v. O'Leary*, 1997 WL 763045, at *3-*5; *Payne 22, Inc. v. United States*, 762 F.2d 91, 93-94 (Temp. Emer. Ct. App. 1985); *Bulzan v. Atlantic Richfield Co.*, 620 F.2d 278, 282 (Temp. Emer. Ct. App. 1980); *Consolidated Edison Co. v. Herrington*, 752 F. Supp. at 1086-87; *Consolidated Edison Co. v. Breznay*, 683 F. Supp. at 835; *Getty Oil Co. v. DOE*, 117 F.R.D. at 547-50.

To allow Petitioners, private third-party claimants, to upset a government agency's recovery under Section 209 "'would simply create chaos . . . [t]he plaintiffs would gain nothing—the public would gain nothing and everyone would lose.'" *Payne 22, Inc. v. United States*, 762 F.2d at 94 (citation omitted). It is for that reason that the Federal Circuit has confirmed, in a very recent case involving Petitioners, that

> [t]he statutory scheme creates a clear distinction between the public enforcement mechanisms of section 209 and section 503, and the private rights created under section 210. Enforcement of [Emergency Petroleum Allocation Act] regulations under section 209 through remedial orders "is the exclusive right of the government," . . . . Conversely, the private cause of action under section 210 of the ESA "is the exclusive remedy for private litigants."

Consolidated Edison Co. v. O'Leary, 1997 WL 763045, at *3 (citations omitted).

To the extent Petitioners rely on Section 211 for a cause of action *(see* Petition at 10, 14), they are singularly misguided. *Consolidated Edison Co. v. O'Leary*, 1997 WL 763045, at *6, correctly holds that Section 211 "does not create a cause of action not otherwise provided for. Instead, . . . section 211 simply confers jurisdiction on federal district courts to hear cases or controversies arising under the ESA, i.e., cases for which a cause of action is elsewhere provided."

Finally, DOE's implementation of the FSA did not establish for Petitioners an entitlement to any specific sum of money. It merely allocated a maximum of 20% of overcharge recoveries from which Petitioners may seek a proportionate refund. The fact that Petitioners are now dissatisfied with the 20% cap, as the Federal Circuit found below, provides no justification for reopening the eleven-year-old, judicially approved FSA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

January 12, 1998

Respectfully submitted,

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IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: THE DEPARTMENT OF ENERGY
STRIPPER WELL EXEMPTION LITIGATION} M.D.L. No. 378

FINAL SETTLEMENT AGREEMENT

SETTLEMENT AGREEMENT

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SETTLEMENT AGREEMENT

This Settlement Agreement (hereinafter this Agreement) is entered into as of the 5th day of May, 1986 between the United States Department of Energy (hereinafter DOE), the States, the Refiners, the Resellers, the Retailers, the Airlines, the Agricultural Cooperatives, the Surface Transporters, the Utilities (as defined hereinafter), and others who become signatories hereto.

WITNESSETH THAT:

WHEREAS, certain parties have been engaged for several years in complex and protracted litigation, entitled *In Re Department of Energy Stripper Well Exemption Litigation* (hereinafter M.D.L. 378);

WHEREAS, certain parties are or will be involved in other proceedings, both judicial and administrative, involving alleged violations of DOE's price and allocation controls applicable to crude oil (hereinafter the Alleged Crude Oil Violations) including but not limited to: (1) the first sale and the resale of crude oil under 10 C.F.R. Part 212, Subparts D, F, and L and (2) the Domestic Crude Oil Allocation Program (hereinafter the Entitlements Program);

WHEREAS, these violations may have had an effect on the Entitlements Program which affected all participants in that Program and thereafter all purchasers of refined petroleum products, or otherwise may have had effects on such purchasers;

WHEREAS, certain parties have been engaged for several years in complex and protracted litigation involving the conclusion of the Entitlements Program administered by DOE;

WHEREAS, the parties desire to compromise and settle certain pending lawsuits and other proceedings, as well as avoid future controversy, by establishing a mutually agreeable

method of disbursing certain funds that have been or will be collected as a result of the alleged violations in issue; and

NOW THEREFORE, in consideration of the mutual promises and covenants contained herein the parties agree as follows:

I. PARTIES

The parties to this Agreement are those Persons, including any individual, firm, corporation, partnership, joint stock company, joint venture, business trust, cooperative, voluntary association, or government or department thereof (herein called a Person), who are or who become signatories to or bound by this Agreement and their predecessors, successors and assigns (hereinafter the Parties). The Parties and recipients of monies pursuant to this Agreement include:

A. *DOE.* DOE is the United States Department of Energy, including the Economic Regulatory Administration (hereinafter the ERA) and the Office of Hearings and Appeals (hereinafter the OHA).

B. *States.* The States include the fifty sovereign States of the United States, the District of Columbia, the Commonwealth of Puerto Rico and the territories and possessions of American Samoa, Guam, the Northern Marianas, and the U.S. Virgin Islands on behalf of themselves and their citizens.

C. *Refiners.* The Refiners include all participants in the Entitlements Program based on actual or deemed runs-to-stills, which are identified in DOE's draft Entitlements Adjustment Notice published in the Federal Register on November 3, 1983, 48 *Fed. Reg.* 50824.

D. *Resellers.* The Resellers include all marketers and distributors of domestically refined petroleum products during any part of the period

August 19, 1973 through January 27, 1981 (hereinafter the Settlement Period) with the exception of the groups which are specifically excluded in the Resellers Order referenced below.

E. *Retailers*. The Retailers include all independent marketers of domestically-refined motor fuels (branded and unbranded gasoline and diesel fuels) who made 50 percent or more of their sales at retail during any part of the Settlement Period, with the exception of those specifically excluded in the Retailers Order referenced below.

F. *Airlines*. The Airlines include all United States-certified air carriers holding a certificate issued pursuant to 49 U.S.C. § 1371 and purchasing domestically-refined kerosene jet fuel during any part of the Settlement Period.

G. *Agricultural Cooperatives*. Subject to the provisions of the Cooperatives Order referenced below, the Agricultural Cooperatives (hereinafter the Co-ops) include all national, regional and inter-regional "cooperative associations" and "cooperatives" (under 12 U.S.C. § 1141j or any state agricultural marketing or association law), including and acting on behalf and for the mutual benefit of all their member-patrons, which Co-ops (1) were engaged in refining or resale of petroleum products to their own member-patrons during any part of the Settlement Period, and (2) presently operate and actively transact business with or for member-patrons on a cooperative basis.

H. *Surface Transporters*. The Surface Transporters include all commercial motor vehicle surface transporters of persons or property including "for hire" carriage and private fleet transportation, regulated and unregulated, and specifically including,

without limitation, trucks, buses and taxicabs, who utilized oil products in such operation at any time during the Settlement Period.

I. *Utilities.* The Utilities include all investor-owned electric utilities utilizing oil or oil products in the generation of electricity at any time during the Settlement Period with the exception set forth in the Utilities Order. Neither cooperatively owned nor governmentally owned utilities are included as Utilities.

II. M.D.L. 378

A. Settlement.

1. *Approval of Agreement.* By execution of or becoming Parties to this Agreement, and subject to Paragraph VI.F, the Parties intend to compromise and settle all claims to the funds in escrow in M.D.L. 378 and any additional funds which are subsequently deposited therein (hereinafter the M.D.L. 378 Escrow), and the funds attributable to injection well issues which were paid by Amoco to DOE on February 1, 1985, in compliance with the February 14, 1980 Amoco consent order, plus interest accrued through the date of disbursement pursuant to this Agreement (hereinafter the DOE/Amoco Stripper Fund). The Parties agree to use their best efforts to obtain approval of this Agreement by the U.S. District Court for the District of Kansas (hereinafter the District Court) and distribution of the M.D.L. 378 Escrow in accordance with this Agreement as expeditiously as possible. A Party who is not otherwise a party to M.D.L. 378 shall not become or be considered a party to M.D.L. 378 by reason of having executed this Agreement nor shall execution hereof be probative of making any Party a party to M.D.L. 378, although all Parties are bound by the terms of this Agreement and agree to be bound by an order of the District Court approving and enforcing the Agreement.

2. *Cooperation on Discovery.* The Parties recognize that there are certain remaining unresolved discovery matters in M.D.L. 378. The Refiners agree to cooperate with DOE in resolving these issues as expeditiously as possible and to facilitate the production of documents and answers to interrogatories to the greatest extent practicable without waiving any substantive rights or claims of privilege which any Refiner may have.

3. *Cooperation on Other Issues.* The Refiners which are or which become parties to M.D.L. 378 agree to cooperate with DOE in obtaining speedy judicial resolution of any liability issues remaining in the litigation. Each Refiner which is or which becomes a party to M.D.L. 378 agrees to pay into the M.D.L. 378 Escrow, within 30 days after the Payment Date as hereinafter defined within 30 days after becoming a party, or within 30 days after a demand for payment by DOE, whichever is later, any monies or portions of monies being held by it which DOE claims should be paid into the M.D.L. 378 Escrow which claims or portions of claims are no longer contested in good faith by such Refiner.

4. *Waiver of Civil Penalties.* DOE agrees to waive and release any claim for civil penalties against any of the Parties arising out of, or relating to, counting injection wells to qualify a property as a stripper property.

5. *Dismissal of Litigation.* Upon District Court approval of this Agreement, and the occurrence of the Payment Date as hereinafter defined, each of the cases making up M.D.L. 378 will be dismissed with prejudice individually when all remaining issues concerning any alleged monetary liability are finally resolved in that particular case and all money owed in that case has been paid into the M.D.L. 378 Escrow. DOE agrees not to assert against a Party whose case has been dismissed under this paragraph any additional claim arising out of, or relating to, counting injection wells to

qualify a property as a stripper well property for the same production and time period covered by the dismissed case. Each of the Parties agrees to bear its own costs incurred in the prosecution or defense of M.D.L. 378 litigation.

6. *Remaining Issues.* Nothing in this Agreement may be read to enlarge, abridge, limit or otherwise affect the ability of the parties to M.D.L. 378 to litigate the issues remaining in M.D.L. 378 concerning the determination and collection of the amount of remaining liability, if any, of any party to M.D.L. 378 for counting injection wells to qualify a property as a stripper well property, or to seek the imposition of sanctions for failure to comply with proper discovery requests.

B. Distribution of Funds.

1. *Initial Distribution.*

a. *Segregation of Initial Accounts.* Upon District Court approval of this Agreement (hereinafter the Approval Order), funds in the M.D.L. 378 Escrow shall be segregated into the following Accounts in the amounts specified in the following paragraphs of this Agreement:

i.	Refiners Amount	II.B.2.a.
ii.	Resellers Account	II.B.2.b.i.
iii.	Retailers Account	II.B.2.c.i
iv.	Airlines Account	II.B.2.d.i
v.	Co-ops Account	II.B.2.e.i
vi.	Surface Transporters Account	II.B.2.f
vii.	Utilities Account	II.B.2.g
viii.	States Account	II.B.3
ix.	DOE Account	II.B.3

b. *Distribution of Initial Accounts.* Distribution of funds from Accounts i through ix above, including interest as provided in Paragraph II.B.1.c, to the respective Parties, or to their Escrows (as hereinafter provided) for further distribution in accordance therewith, shall proceed, subject to District Court approval, upon the earliest date provided below:

i. if no opposition to this Agreement is filed with the District Court, as soon as that court may permit;

ii. if no appeal is taken from the Approval Order, upon expiration of the time for appeal;

iii. if an appeal is taken from the Approval Order which solely concerns the process or procedural mechanism for payments of funds in one or more of the Accounts i through ix above, or a determination of eligibility for payment to a party who claims that it is eligible under the terms of this Agreement for payment from such Account(s), or respective Escrow(s), as soon as the District Court may permit, except to the extent distribution of some or all of the funds in the Account(s) or Escrow(s) which is the subject of such appeal(s) is stayed pending appeal; or

iv. if not earlier distributed, upon a final judgment or order approving this Agreement which judgment or order is not subject to further appellate review (hereinafter Final Court Approval).

The date on which funds are distributed to all of the Parties or their Escrows, except any Party or Escrow as may be subject to a stay as described in (iii) above, shall hereinafter be referred to as the Payment Date.

c. *Interest.* A proportionate share of any earnings of the M.D.L. 378 Escrow shall accrue to the benefit

of, and be included in, each Account segregated under Paragraph II.B.1 effective from the date of the Approval Order until the date of disbursement of that Account as provided under this Agreement.

2. *Distributions to Non-Governmental Parties.*

a. *Refiners.* The amount of $298,514,000 (hereinafter the Refiners Distribution shall be segregated pursuant to Paragraph II.B.1.a, into the Refiners Account for disbursal, pursuant to Paragraph II.B.1.b, to the Refiners Escrow Agent for further distribution in accordance with the Refiners Escrow Agreement (attached hereto as Exhibit A).

b. *Resellers.*

i. *Initial Distribution.* The amount of $44,690,371 shall be segregated, pursuant to Paragraph II.B.1.a, into the Resellers Account for disbursal, pursuant to Paragraph II.B.1.b, to the Resellers Escrow (hereinafter the Resellers Initial Distribution) for further distribution pursuant to the Order Establishing Resellers Escrow and Prescribing Provisions for Administration of the Fund (hereinafter the Resellers Order attached as Exhibit B). In the event the total amount in the M.D.L. 378 Escrow and the DOE/Amoco Stripper Fund, irrespective of any funds set aside pursuant to Paragraph II.C (hereinafter the Total Fund), is less than $1.433 billion at the time of the Approval Order, then 2.25 percent of the difference between $1.433 billion and the Total Fund shall be deducted from the Resellers Initial Distribution. In the event the Total Fund exceeds $1.433 billion on the date of the Approval Order, then 2.25 percent of the amount by which the Total Fund exceeds $1.433 billion, plus interest thereon, not to exceed $13,790,323 (hereinafter the Resellers Excess Fund), shall be segregated for disbursal to the Resellers Escrow on the first anniversary of the Resellers Initial

Distribution and shall not be disbursed to any other Party or otherwise depleted from the M.D.L. 378 Escrow.

ii. *Second Distribution.* One year after the Resellers Initial Distribution and subject to Paragraph II.B.2.h, the sum of (i) the amount of $13,790,323, which shall include the Resellers Excess Funds, if any, and (ii) the amount of any deduction made from S44,690,371 under the Resellers Initial Distribution pursuant to Paragraph II.B.2.b.i. (hereinafter the Resellers Second Distribution) shall be disbursed from the M.D.L. 378 Escrow to the Resellers Escrow for further distribution pursuant to the Resellers Order.

c. *Retailers.*

i. *Initial Distribution.* The amount of $44,690,371 shall be segregated, pursuant to Paragraph II.B.1.a. into the Retailers Account for disbursal, pursuant to Paragraph II.B.1.b, to the Retailers Trustee (hereinafter the Retailers Initial Distribution) for further distribution pursuant to the Order Approving Independent Retailers of Motor Fuels Group Administration and Trust Agreement (hereinafter the Retailers Order attached hereto as Exhibit C). In the event the Total Fund is less than $1.433 billion on the date of the Approval Order, then 2.25 percent of the difference between $1.433 billion and the Total Fund shall be deducted from the Retailers Initial Distribution. In the event the Total Fund exceeds $1.433 billion at the time of the Approval Order, then 2.25 percent of the amount by which the Total Fund exceeds $1.433 billion, plus interest thereon, not to exceed $13,790,323 (hereinafter the Retailers Excess Funds), shall be segregated for disbursal to the Retailers Trustee on the

first anniversary of the Retailers Initial Distribution, and shall not be disbursed to any other Party or otherwise depleted from the M.D.L. 378 Escrow.

ii. *Second Distribution.* One year after the Retailers Initial Distribution and subject to Paragraph II.B.2.h, the sum of (i) the amount of $13,790,323, which shall include the Retailers Excess Funds, if any, and (ii) the amount of any deduction made from $44,690,371 under the Retailers Initial Distribution pursuant to Paragraph II.B.2.c.i. (hereinafter the Retailers Second Distribution) shall be disbursed from the M.D.L. 378 Escrow to the Retailers Trustee for further distribution pursuant to the Retailers Order.

d. *Airlines.*

i. *Initial Distribution.* The amount of $29,793,581 shall be segregated, pursuant to Paragraph II.B.1.a, into the Airlines Account for disbursal, pursuant to Paragraph II.B.1.b, to the Airlines Escrow (hereinafter the Airlines Initial Distribution) for further distribution pursuant to the Order Establishing Airlines Escrow and Prescribing Escrow Instructions (hereinafter the Airlines Order attached hereto as Exhibit D). In the event the Total Fund is less than $1.433 billion at the time of the Approval Order, then 1.50 percent of the difference between $1.433 billion and the Total Fund shall be deducted from the Airlines Initial Distribution. In the event the Total Fund exceeds $1.433 billion on the date of the Approval Order, then 1.50 percent of the amount by which the Total Fund exceeds $1.433 billion, plus interest thereon, not to exceed $9,193,548 (hereinafter the Airlines Excess Funds), shall be segregated for disbursal to the Airlines Escrow on the first anniversary of the Airlines Initial Distribution, and

shall not be disbursed to any other Party or otherwise depleted from the M.D.L. 378 Escrow.

ii. *Second Distribution.* One year after the Airlines Initial Distribution and subject to Paragraph II.B.2.h, the sum of (i) the amount of $9,193,548, which shall include the Airlines Excess Funds, if any, and (ii) the amount of any deduction made from $29,793,581 under the Airlines Initial Distribution pursuant to Paragraph II.B.2.d.i (hereinafter the Airlines Second Distribution) shall be disbursed from the M.D.L. 378 Escrow to the Airlines Escrow for further distribution pursuant to the Airlines Order.

e. *Agricultural Co-ops.*

i. *Initial Distribution.* The amount of $34,751,177 shall be segregated, pursuant to Paragraph II.B.1.a, into the Co-ops Account for disbursal, pursuant to Paragraph II.B.1.b, to the Co-ops Escrow (hereinafter the Co-ops Initial Distribution) for further distribution pursuant to the Order Establishing Agricultural Cooperatives Settlement Fund and Prescribing Provisions for the Administration and Distribution of the Fund (hereinafter the Co-ops Order attached hereto as Exhibit E). In the event the Total Fund is less than $1.433 billion on the date of the Approval Order, then 1.75 percent of the difference between $1.433 billion and the Total Fund shall be deducted from the Co-ops Initial Distribution. In the event the Total Fund exceeds $1.433 billion at the time of the Approval Order, then 1.75 percent of the amount by which the Total Fund exceeds $1.433 billion, plus interest thereon, not to exceed $10,725,806 (hereinafter the Co-ops Excess Funds), shall be segregated for disbursal to the Co-ops Escrow on the first anniversary of the Co-ops Initial Distribution, and shall not be disbursed to any other

Party or otherwise depleted from the M.D.L. 378 Escrow.

ii. *Second Distribution.* One year after the Co-ops Initial Distribution and subject to Paragraph II.B.2.h, the sum of (i) the amount of $10,725,806, which shall include the Co-ops Excess Funds, if any, and (ii) the amount of any deduction made from $34,751,177 under the Co-ops Initial Distribution pursuant to Paragraph II.B.2.e.i (hereinafter the Co-ops Second Distribution) shall be disbursed from the M.D.L. 378 Escrow to the Co-ops Escrow for further distribution pursuant to the Co-ops Order.

iii. *Indemnification.* Any Co-op receiving payment from the Co-ops Escrow agrees to indemnify all other Parties to this Agreement for any claims for refund based on Alleged Crude Oil Violations which are brought by any of its member-patrons but only to the extent of the amount of payment received by that Co-op from the Co-ops Escrow.

iv. *Reserve.* The Co-ops eligibility criteria set forth in Paragraph I.G provides for a restitutionary mechanism that will benefit farmers and other agricultural end-users that obtained petroleum products from agricultural cooperatives which they owned and operated for their mutual benefit. If an appeal is taken by a co-op from the Approval Order which challenges its own ineligibility under paragraph I.G, the Administrator of the Co-ops Fund shall seek an order of the District Court to establish a sufficient reserve pending final resolution of the ineligibility challenge. Such appeal shall not prevent or delay the distribution of funds from any Account to the Parties, or to or from any of the Escrows, for further distribution, except as to any reserve established hereunder.

f. *Surface Transporters.* The amount of $10,750,000 shall be segregated, pursuant to Paragraph II.B.1.a, into the Surface Transporters Account for disbursal, pursuant to Paragraph II.B.1.b, to the Surface Transporters Escrow for further distribution pursuant to the Order Establishing Surface Transporters Escrow (attached hereto as Exhibit F).

g. *Utilities.* The amount of $5,250,000 shall be segregated, pursuant to Paragraph II.B.1.a, into the Utilities Account for disbursal, pursuant to Paragraph II.B.1.b, to the Utilities Escrow for further distribution pursuant to the Order Establishing Utilities Escrow (attached hereto as Exhibit G).

h. *Conditions Applicable to Second Distributions.* All funds, other than the DOE/Amoco Stripper Fund, deposited after the date of the Approval Order in the M.D.L. 378 Escrow and the amounts, if any, of Resellers Excess Funds, Retailers Excess Funds, Airlines Excess Funds and Co-ops Excess Funds, shall be specifically reserved for payment of Second Distributions pursuant to Paragraphs II.B.2.b.ii, c.ii, d.ii, and e.ii, until each of such Second Distribution amounts has been fully funded. When any group has received an amount in satisfaction of its Second Distribution, the amount thereafter required to be reserved shall be reduced by the maximum amount of that group's Second Distribution as described in Paragraph II.B.2.b.ii, e.ii, d.ii, or c.ii. No disbursements shall be made from the funds deposited after the date of the Approval Order in the M.D.L. 378 Escrow until the Resellers, Retailers, Airlines and Co-ops have been paid their Second Distributions or until such amounts have been specifically reserved in the M.D.L. 378 Escrow for payment to the Settlement Escrows of Resellers, Retailers, Airlines and Co-ops. In the event funds in the M.D.L. 378 Escrow on or after the first anniversary of each group's Initial Distribution equal or exceed the sum of the full

amounts of the Second Distribution pursuant to Paragraphs II.B.2.b.ii, c.ii, d.ii, and e.ii, but disbursement is stayed by reason of the pendency of an appeal, a proportionate share of any interest earnings of the M.D.L. 378 Escrow shall accrue to the benefit of and be added to the amounts of such Second Distributions effective from the first anniversary of the Initial Distribution until the earliest date disbursement of such Second Distribution is permitted. In the event the funds in the M.D.L. 378 Escrow on such first anniversary of the Initial Distribution are less than the sum of the full amounts of the Second Distributions to the Resellers, Retailers, Airlines and Co-ops pursuant to Paragraphs II.B.2.b.ii, c.ii, d.ii and e.ii, then, in satisfaction of their Second Distributions the administrators of the funds for the Resellers, Retailers, Airlines and Co-ops shall each have the separate right to elect to (i) receive the group's proportionate share of the funds in the M.D.L. 378 Escrow on such first anniversary in satisfaction of its Second Distribution or (ii) postpone the group's Second Distribution to a time of its choosing subsequent to the first anniversary of its Initial Distribution, but no later than the date of dismissal of the last individual case making up M.D.L. 378. If any of the administrators of the funds for the Resellers, Retailers, Airlines or Co-ops elects to receive the group's Second Distribution under (ii) above at a time when the funds in the M.D.L. 378 Escrow are less than the sum of the full amounts of the Second Distributions to the Resellers, Retailers, Airlines and Co-ops which remain unsatisfied, then its Second Distribution amount shall be equal to its proportionate share of the funds in the M.D.L. 378 Escrow at the time it elects to receive its amount in satisfaction of its Second Distribution. Each group's proportionate share shall be equal to a ratio, the numerator of which shall be the full amount of that group's Second Distribution and the denominator of which shall be the sum of the full amounts of the Second Distribution of that group and

all other groups which have not yet elected to receive their Second Distributions.

3. *Distributions to DOE and the States.*

a. *DOE/States Available Fund Disbursement.* Except as provided in Paragraphs II.B.3.c, d, and e, 50 percent of that portion of the Total Fund which is not required to be segregated or reserved on the date of the Approval Order under Paragraph II.B.2 or set aside under Paragraph II.C (hereinafter the Available Fund) shall be paid to the States pursuant to Paragraph II.B.1. in the manner and for the restitutionary uses described in Paragraph II.B.3.f, provided that the amount paid to any State shall be reduced by the amounts, if any, disbursed for litigation expenses pursuant to a designation under Paragraph II.B.3.f.iii, and the remainder of such Available Fund (less $50 million reserved to assure the disbursement to the States from OHA as provided in Paragraph IV.B.7) shall be disbursed to or retained by DOE.

b. *DOE/States Incremental Fund Disbursement.* Except as provided in Paragraphs II.B.3.c, d, and e, after the disbursement under Paragraph II.B.3.a, every 90 days, or each time the amounts in the M.D.L. 378 Escrow (excluding amounts reserved under Paragraph II.B.2.h and amounts set aside pursuant to Paragraph II.C) (hereinafter the Incremental Fund) reach $10 million, whichever is earlier, 50 percent of the Incremental Fund shall be disbursed to the States in the manner and for the uses described in Paragraph II.B.3.f, provided that the amount paid to any State shall be reduced by the amounts, if any, disbursed for litigation expenses pursuant to a designation under Paragraph II.B.3.f.iii, and the remainder of the Incremental Fund shall be disbursed to or retained by DOE.

c. *Advance Fund.* The disbursement of 50 percent of the Available Fund to the States shall be increased by an additional amount of $200 million (hereinafter the

Advance Fund) from that portion of the Available Fund which would otherwise be disbursed to or retained by DOE. The DOE shall be reimbursed for the Advance Fund as follows:

i. after the total amount of $924,560,500 has first been disbursed to DOE and the States from the Available Fund, or from the Available Fund and the Incremental Fund, from the next $400 million of disbursements to DOE and the States from the Available Fund and the Incremental Fund, $100 million more will be disbursed to DOE than otherwise would be disbursed under II.B.3.a and b, by reallocating to DOE one-half of the States' disbursement(s) from disbursements of such $400 million; and

ii. after the total amount of $100 million of the funds attributable to Alleged Crude Oil Violations has been disbursed by OHA to DOE and the States pursuant to Paragraph IV.B.7, from the next $400 million disbursed by OHA, $ 100 million more will be disbursed to or retained by DOE than otherwise would be disbursed or retained under Paragraph IV.B.7, by reallocating to DOE one-half of the States' disbursement(s) from disbursements of such $400 million.

d. *Funding of Second Distributions.* In calculating the amount of funds to be disbursed to DOE and the States from the Incremental Fund, the disbursements and/or reservations of monies in the Incremental Fund under Paragraph II.B.2.h shall be deducted from the first funds which otherwise would have been disbursed to DOE fron the Incremental Fund; provided, however, that no amount shall be disbursed pursuant to Paragraph II.B.3.b until the amount required to be reserved in Paragraph II.B.2.h has been fully funded. Reimbursement by the States to DOE for not nore than one-half of the amount of the disbursements and/or

reservations under Paragraph II.B.2.h shall be effectuated by a reduction in the disbursements to the States that otherwise would be made under Paragraphs II.B.3.b and c by an amount equal to 3.875 percent of each combined DOE/States disbursement from the Incremental Fund and an increase in the disbursements to DOE by a corresponding amount.

e. *Assurance Fund.* The amount of $50 million from the Available Fund that would otherwise be segregated into the DOE Account on the date of the Approval Order shall be reserved (hereinafter the Assurance Fund) to assure the disbursement to the States from OHA, provided in and to be disbursed pursuant to, Paragraph IV.B.7. This $50 million amount will be treated for purposes of the calculations in Paragraphs II.B.3.a, b, c, and d as having been disbursed in its entirety to DOE under Paragraph II.B.3.a irrespective of whether all or a portion of such $50 million is disbursed to the States pursuant to Paragraph IV.B.7.

f. *State Use of Funds.* Funds available for distribution to the States shall be allocated among them on the basis of historical consumption patterns of refined petroleum products in the United States during the Settlement Period in the proportions as set forth in Exhibit H hereto, provided that no funds shall be distributed to a State until such State has submitted the signed Letters of Assurance required by this Paragraph. The payment mechanism set forth herein shall be the exclusive means of achieving distribution of the funds. The Attorney General of each State shall deliver to the Governor of such State, for the Governor's execution, duplicate originals of a Letter of Assurance in the form set forth in Exhibit I to this Agreement. Within 20 days following the date of the Approval Order, the Attorney General shall deliver to the Clerk of the Court and to the Administrator of ERA, DOE, such Letters of Assurance signed by the Governor of such State. At the same time, the Attorney General of each

State shall designate in writing to the disbursing official of the M.D.L. 378 Escrow whether disbursement shall be by check or by wire transfer, and if by wire transfer, shall provide instructions for the transmittal of funds. Disbursement of all funds to such State thereafter shall be in the form designated by the Attorney General and made payable to "The State of _____". Physical delivery of a check shall be made by the disbursing official to the Attorney General and in the case of a wire transfer, advance written notice of the date and amount of the wire transfer shall be delivered to the Attorney General prior to the sending of each wire transfer. Upon receipt of each check or wire transfer notice, the Attorney General shall deliver it promptly to the Governor of such State. As used in this Paragraph II.B.3.f, "Attorney General" means the Attorney General of a State, or his or her duly authorized representative, and includes any other State official who intervened in M.D.L. 378 prior to the execution of the Memorandum of Understanding of January 24, 1986 preceding this Agreement. In the case of any State where an official other than or in addition to the Attorney General intervened in M.D.L. 378 prior to January 24, 1986, all references in this Paragraph II.B.3.f to the Attorney General shall mean the Attorney General jointly with such official. Such funds (including interest earned on the funds following their receipt by the States) will be utilized as follows:

i. *Public Notice.* Each State will give reasonable notice to the public that it has received the funds and will generally describe the types of restitutionary programs on which the, State may expend the funds. Each State will conduct informal hearings at which the public may present its views concerning such expenditures. Any State which has held hearings with regard to the uses of oil overcharge refunds during the two-year period preceding the date of the Approval Order will not be required to hold additional hearings.

Legislative hearings in accordance with applicable State procedures shall be sufficient to comply with the requirements of this subsection.

ii. *Restitutionary Program.* Monies received by any State shall be utilized to fund one or more existing or new energy-related programs which are designed to benefit, directly or indirectly, consumers of petroleum products within the State. State governments are familiar with the particular energy needs of their citizens, and therefore they are in the best position to select the specific programs that will most effectively provide restitution to their citizens. In order to provide the flexibility to select from a complement of approved options which will insure consideration of local needs and circumstances, each State will be accorded discretion in selecting specific programs to provide widespread benefits to consumers of petroleum products; provided, however, that each State shall take into consideration the facts relating to usage of petroleum products within such State during the Settlement Period by various categories of such consumers and that the funds received by each State will be used to supplement, and not to supplant, funds otherwise available for such programs under Federal or State law. State funding of programs shall be limited to (1) those approved by OHA in Subpart V refund proceedings; (2) those referenced in the consent order which DOE entered into in 1981 with Standard Oil Company of California (Chevron) (46 *Fed. Reg.* 52221; October 26, 1981); (3) the types of energy conservation activities set forth in the following legislation:

(a) Part A of the Energy Conservation and Existing Buildings Act of 1976 (relating to weatherization of buildings; 42 U.S.C. 6861 *et seq.*);

(b) Part D of Title III of the Energy Policy and Conservation Act (relating to primary and supplemental State energy conservation programs; 42 U.S.C. 6321 *et seq.*);

(c) Part G of Title III of the Energy Policy and Conservation Act (relating to the energy conservation for schools and hospitals; 42 U.S.C. 6371 *et seq.*);

(d) The National Energy Extension Service and Conservation Act (relating to the promotion of conservation by small businesses and individuals; 42 U.S.C. 7001 *et seq.*); and

(e) The Low-Income Home Energy Assistance Act of 1981 (relating to assisting the poor with home utility bills; 42 U.S.C. 8621 *et seq.*);

and (4) such other restitutionary programs as may be approved by the District Court. Exhibit J exemplifies the programs approved by DOE and referenced above.

i. *Administrative Expenses.* Each State shall be entitled to expend for administrative expenses up to the amounts permitted by Federal legislation or regulation governing federally funded programs comparable to those identified in Paragraph II.B.3.f.ii and, where there is no such Federal legislation or regulation, up to five percent of the funds allocated pursuant to Exhibit H. Administrative expenses shall include the payment or reimbursement of attorneys' fees, expert witness' fees, contractual obligations and other related costs incurred in connection with pursuit of the State's Alleged Crude Oil Violations claims. The Attorney General of a State shall designate, by written notice filed with the disbursing official, the amount and manner of direct disbursements, if any, for payment or reimbursement of such litigation expenses.

ii. *Reporting of Expenditures.* At least 30 days prior to the expenditure of funds or permissible payments under this Agreement, each State shall submit a report to the District Court in M.D.L. 378 and to the Secretary of Energy identifying the programs or payments for which such funds will be expended. Within 30 days after the close of its fiscal year, each State shall submit a report to the District Court in M.D.L. 378 and to the Secretary of Energy concerning the uses for which the funds received under this Agreement have been expended and the amounts expended for each use, until all funds shall have been expended.

g. DOE Funds. Funds to be disbursed to DOE pursuant to this Agreement may be transmitted by check or by wire transfer to the Controller, DOE. Funds disbursed to or retained by DOE shall be subject to the further instruction of the Secretary, DOE, or his designee, for deposit in the U.S. Treasury or for such purpose as he may direct, consistent with law and this Agreement.

C. The Set Aside

1. *Pending Litigation.* The Parties recognize that there is certain litigation now pending in the District Court which is not presently part of M.D.L. 378 but which involves the same crude oil miscertifications as those in M.D.L. 378. Specifically, *Kerr-McGee Corporation v. Gulf Oil Corporation*, Case No. 84-1061, and *Total Petroleum Corporation v. Muskegon Oil Company*, Case No. 85-1968-T, involve claims by first purchasers of the miscertified stripper oil under Section 210 of the Economic Stabilization Act of 1970, 12 U.S.C.A. 1904 (note) (hereinafter the ESA).

2. *Escrow Set Aside.* On the date of the Approval Order and prior to any distribution hereunder, $30 million for *Kerr-McGee v. Gulf,* and $10 million for *Total v. Muskegon,*

of the M.D.L. 378 Escrow shall be set aside and retained in escrow, together with interest thereon, to satisfy any final judgment obtained by the plaintiffs in either of the above mentioned cases in the event the District Court rules in M.D.L. 378 that such judgment should be satisfied directly or indirectly out of such funds; provided, however, that this set aside does not compromise or otherwise preclude any Party hereto from maintaining that such judgment should not be satisfied directly or indirectly out of such funds; and provided further that this paragraph shall confer no standing in those cases on any Party which it would not otherwise have. Set aside funds not used to satisfy any such final judgment shall be deemed to be funds deposited in the M.D.L. 378 Escrow after the date of the Approval Order.

3. *Future Set Asides*. In the event that any Party (1) was a party to M.D.L. 378; (2) was dismissed from that litigation; (3) withdrew funds from the M.D.L. 378 Escrow in connection with such dismissal; and (4) hereafter becomes a party to M.D.L. 378 and repays the previously withdrawn funds to the M.D.L. 378 Escrow plus the amount of uncontested interest, then a sufficient amount of the repaid funds shall be set aside by the District Court to satisfy any Section 210 ESA claim asserted in litigation prior to December 1, 1985 against that Party which involves the same crude oil miscertifications as those in M.D.L. 378 to the same extent and with the same limitation as in Paragraph II.C.2. Such repayment shall not be deemed to affect any dispute which may exist as to any additional amount which may be required to be paid into the M.D.L. 378 Escrow by that Party.

III. WAIVERS, RELEASES AND EXCLUSIONS

A. Waivers and Releases

1. *Release of Claims to Crude Oil Funds.* Subject to Paragraphs II.B.1 and 2 and effective upon the Payment Date, the Parties other than DOE and the States release, waive, and agree to withdraw any claims before any Federal or state court or agency, including the District Court in M.D.L. 378 (except any claims specifically excluded in Paragraphs II.C, III.A.4-5, III.B.1-10, IV.A and V.G): (a) against funds which have been or will be paid to satisfy compliance or enforcement actions (including declaratory actions) brought or to be brought based on Alleged Crude Oil Violations, including recoveries of such funds (i) within DOE's control, or (ii) in escrows created or to be created by DOE, any court or agency, and (b) against the orders or agreements by which such funds have been or will be created or maintained. As to the funds described in Paragraph II.B and Part IV of this Agreement, all Parties waive and release any claim other than claims under this Agreement, to: (a) the funds disbursed or to be disbursed to or retained by DOE, except those claims specifically excluded in Paragraph V.G; and (b) the funds disbursed or to be disbursed to the States.

2. *Refiners Release.* Prior to distribution by the Refiners Escrow Agent, the Refiners Escrow Agent shall secure from each Refiner receiving funds hereunder the waiver and release in the form set forth in Attachment A to the Refiners Escrow Agreement (hereinafter the Refiners Release). The Parties agree that the Refiners Distribution and the waiver and release of claims to funds covered by Parts II and IV hereof shall not be affected by Part V.

3. *Other Releases.* As a condition to receiving any payment from their respective Escrows, each Reseller, Retailer, Airline, Co-op, Surface Transporter and Utility

claimant, seeking payment from such an Escrow shall execute and deliver the waiver and release pertinent to it, including a waiver and release of all claims which a Party waives under Paragraph III.A. 1, in the form set forth in Exhibits B, C, D, E, F or G hereto, which shall be deemed to be effective upon the Payment Date. Upon receipt of any payment from their respective Escrows each Reseller, Retailer, Airline, Co-op, Surface Transporter and Utility claimant except as to claims excluded in Paragraphs III.A.5, III.B.6, and V.G, shall also withdraw all covered claims for funds based upon Alleged Crude Oil Violations, except as otherwise excluded, pending before any court or Federal agency. Such waiver and release, however, shall not affect the right of Reseller, Retailer, Airline, Co-op, Surface Transporter and Utility claimants to any future payments from their respective Escrows.

4. *Certain Claims Reserved.* Nothing in this Agreement shall be construed or shall constitute a release of any Reserved Offset Claim or Reserved Claim as defined in and reserved under Paragraphs (B) or (E), respectively, of the Refiners Release and made in any pending or future litigation or proceeding.

5. *Section 210 Claims.* Nothing in this Agreement or in any release executed pursuant hereto shall waive or release any claim in private litigation under Section 210 of the ESA by a Party (or Person who files a claim and signs a release pursuant to this Agreement or any Exhibit hereto) against a Person who is not or does not become a Party or a claimant. Effective upon the Payment Date all Parties to this Agreement waive and release as to each other any claims or actions which have been or may be brought pursuant to Section 210 of the ESA seeking recovery for Alleged Crude Oil Violations, except (a) claims, defenses, counterclaims and claims of offset reserved in Paragraph III.A.4; (b) claims asserted by Refiners as first purchasers in private litigation commenced prior to

December 1, 1985 involving claims of overcharges in first sales of crude oil (other than any such claim based upon the effort or impact or influence upon the Entitlements Program resulting from the improper certification of crude oil under the Crude Oil Regulations which is not excluded and excepted in Paragraphs (B) and (E)-(R), both inclusive, of the Refiners Release); and (c) all claims asserted prior to December 1, 1985 pursuant to Section 210 of the ESA by the parties in *Kern Oil & Refining Co. v. Tenneco Oil Co.*, Nos. CV 81-3253 LEW, CV 82-6875 (C. D. Cal.); provided that the reservation in this Paragraph of any such private action and recovery under Section 210 of the ESA shall in no way affect the waiver of claims to funds set forth in Paragraph III.A.1 of this Agreement, and provided further that this Paragraph shall in no way affect claims brought by DOE in any such action.

6. *Amoco.* Provided Amoco becomes a Party, and effective upon the Payment Date, all other Parties waive and release any claims or actions which have been or could have been brought pursuant to Section 210 of the ESA, or otherwise, relating to Alleged Crude Oil Violations based on Amoco's pricing of injection well crude oil refined by Amoco, which had never been sold to, or transferred to, a third party (self-refined crude oil), or relating to DOE's exercise of its enforcement discretion in resolving DOE's claims for Alleged Crude Oil Violations pertaining to Amoco's self-refined crude oil, except claims, defenses, counterclaims or claims of offset reserved in Paragraphs III.A.4 and III.A.5.

7. *Consumers Power.* If Exxon becomes a Party, on the Payment Date, all Parties, and any Affiliates of any Party, which are plaintiffs or intervenors in *Consumers Power Company, et al. v. Exxon Corporation*, Civil Action No. H83-0610 (N.D. Ind.), shall dismiss their complaints in that litigation, with prejudice.

B. Exclusions

1. *DOE v. Hunt.* Except as provided in Paragraph (G) of the Refiners Release, the Parties specifically do not compromise their claims, counterclaims, defenses, rights to intervene or other rights asserted prior to December 1, 1985, in *DOE v. Hunt*, Nos. 5-101, 5-102 (Em. App.), with respect to any funds heretofore paid or deposited in escrow for disposition pursuant to a final judgment in such action, except that, once the claims, counterclaims and defenses of the parties in that action are resolved or settled and satisfied, distribution of any funds remaining in escrow shall, with the approval of the court, be governed by this Agreement.

2. *Diamond Shamrock.* Except as provided in Paragraph III.A.6 hereof and, as to Refiners, Paragraph (G) of the Refiners Release, the parties to such litigation specifically do not compromise their claims, counterclaims, defenses, rights to intervene or other rights as against one another asserted prior to December 1, 1985, in *Diamond Shamrock Refining and Marketing Co. v. Standard Oil Co.* Civil Action No. C2-84-1432 (S.D. Ohio), or with respect to any funds heretofore paid or deposited in escrow for disposition pursuant to a final judgment in such action except that, once the claims, counterclaims and defenses of the Refiners in that action are resolved or settled and satisfied, distribution of any funds remaining in escrow shall, with the approval of the court, be governed by this Agreement.

3. *Citronelle.* This Agreement also specifically excludes (a) any amounts held in escrow pursuant to any administrative or court order in existence as of the date of this Agreement in *In Re Three Forty One (341) Tract Unit of the Citronelle Field*, OHA Case Nos. BEN-0078, *et al.*; which may be refunded or paid to Refiners pursuant to adjudication or settlement of said matters before OHA and (b) any amounts previously held in escrow pursuant to such orders or any other

funds at issue in such matters which may be refunded or paid to Refiners; and the Parties specifically do not compromise their claims, counterclaims, defenses, rights to intervene or other rights asserted prior to December 1, 1985, in *Exxon Corporation, et al. v. DOE. et al. (The 341-Tract Unit of the Citronelle Field)*, No. 81-25 MMS or *Texaco, Inc., et al. v. DOE, et al*, No. 81-99 MMS (D. Del.), with respect to funds which may be in dispute or in issue in those proceedings. Notwithstanding the exclusion from this Agreement of the funds described in the preceding sentence, no purchaser of crude oil from the 341 Tract Unit of the Citronelle Field shall hereafter have any liability under any statutes or regulations administered by or orders issued by DOE with respect to, or suffer any detriment as a result of, the issues and claims contained in those cases and decisions referenced by the following citations: OHA Case Nos. BEN-0078 (7 DOE ¶81,140); DEE-7746, HED-0079 (10 DOE ¶81,027); and BEX-0180 (9 DOE ¶82,509). Any and all such existing liabilities are forever extinguished.

4. *Gulf/Cities*. Nothing in this Agreement shall in any way apply to or in any way limit any claims, counterclaims, affirmative defenses or any other contentions of the parties in any litigation arising out of or relating to Gulf's 1982 proposed merger with Cities Service Company or Gulf's tender offer for or purchase of Cities Service Company stock in 1982; provided that nothing in the reservation of such action shall in any way affect the waiver and release of claims to the funds covered elsewhere in this Agreement.

5. *Ashland.* Nothing in this Agreement shall limit the claims of Ashland Oil Inc. left open by TECA in *New York Petroleum Corp. v. Ashland Oil, Inc.*, 757 F.2d 288 (Em. App. 1985), as to the funds in that case.

6. *Getty/Sohio*. The matters in *Getty Oil Co.*, OHA Case No. HRR-0074 (and related cases), concerning the yet

undetermined issues of liability remanded by the District Court in *Getty Oil Co. v. DOE*, C.A. No. 77-434 (D. Del.), are excluded from this Agreement, provided, however, that to the extent the funds arising out of such matters are determined to be Alleged Crude Oil Violations funds, the provisions of paragraph IV.B hereof shall apply.

7. *Other Funds Not Affected.* Nothing in this Agreement may be construed to adversely affect the right of any Party to retain any Alleged Crude Oil Violation funds which that Party has received or has heretofore become entitled to receive pursuant to a final agency or court order, except that funds held in escrow by DOE for restitutionary redistribution are subject to this Agreement unless elsewhere otherwise provided in this Agreement. DOE and the States do not waive or release any claim to funds returned to a Party which (a) was a party to M.D.L. 378; (b) was dismissed from that litigation; and (c) withdrew such funds from the M.D.L. 378 Escrow in connection with such dismissal. Nothing in this Agreement shall prevent any Party in any Alleged Crude Oil Violation litigation from asserting a claim (other than a claim that the measure of liability for an overcharge for crude oil is different than the excess of the actual price received above the applicable ceiling price under the Crude Oil Regulations) that funds have been deposited erroneously in an escrow in that litigation in excess of that Party's actual liability so long as such funds remain undistributed from such escrow or such claim is asserted as an offset to a claim that additional monies should be paid into such escrow.

8. *Hawkins Field.* This Agreement shall have no effect on the distribution of the funds to the States in *United States v. Exxon Corp.*, 561 F. Supp. 816 (D.D.C. 1983), *aff'd*, 773 F.2d 1240 (Em. App. 1985), cert. denied, 54 USLW 3495 (Jan. 28, 1986) (Nos. 85-429 *et al.*), provided, however, (a) nothing in this Agreement shall in any way affect the rights, if

any, of Exxon to seek reversal, revision or reconsideration of the judgment of the district court entered in that case, and (b) if such district court judgment is reversed or set aside by the Supreme Court, then in such event Exxon's execution of this Agreement or of the Refiners Release shall not affect Exxon's rights, if any, in such litigation including, without limitation, its claims, if any, to recover funds paid by Exxon in that litigation, except only to the extent, if any, that any such claim or right may be affected or limited by the provisions of Paragraph (B) of the Refiners Release.

9. *Department of Interior.* Nothing in this Agreement shall limit by a Party any claim against the United States Department of Interior which claim arises out of or is related to Alleged Crude Oil Violations in sales of crude oil by the United States Department of Interior.

10. *Tertiary Incentive Claims.* Nothing in this Agreement shall limit any claim or defense which is preserved under Paragraph (R) of the Refiners Release by a Party for or against recovery of Tertiary Incentive Revenue (as defined in the Tertiary Incentive Program regulations) the Tertiary Incentive Program regulations, originally appearing in 10 C.F.R. § 212.78 and thereafter amended.

IV. OTHER ALLEGED CRUDE OIL VIOLATIONS PROCEEDINGS

A. Pending and Future DOE Actions.

1. *Pending DOE Actions.* Except for the matters which are settled herein, DOE intends, and retains full authority, to continue to prosecute and seek appropriate restitutionary remedies for unresolved alleged violations. The defenses assertable by any party in such actions shall in no way be impaired or otherwise affected by this Agreement or any waiver and release executed pursuant hereto (except insofar as any such defense may assert a restitutionary right to

recover, as an injured party, Alleged Crude Oil Violations funds paid or to be paid by others, or by such party in any other action, and held by DOE or a court or otherwise subject to this Agreement that has otherwise been waived and released under this Agreement). Funds attributable to injection well issues paid or escrowed or to be paid or escrowed by a former party to M.D.L. 378 shall be deemed to be M.D.L. 378 Escrow funds and deposited therein as of the date of such payment or escrow, whether or not paid into the M.D.L. 378 Escrow. In those instances where DOE proposes to enter into a settlement regarding an Alleged Crude Oil Violation, the States will be accorded the courtesy of reasonable notice by DOE of the amount to be recovered prior to the actual signing of such proposed settlement by any of the parties thereto. Nothing in this Paragraph shall in any way affect claims pursuant to Section 210 of the ESA which are reserved under Paragraph III.A.5 of this Agreement.

2. *Future DOE Actions.* With the sole exception set forth in Paragraph II.A.4, nothing in this Agreement shall be read or construed to limit or render reviewable the exercise of DOE's prosecutorial discretion in determining the appropriate action to take, if any, with regard to any enforcement matter. Further, nothing in this Agreement shall be read or construed to impose any obligation or duty upon the DOE regarding the enforcement or non-enforcement of its regulations, and it remains solely in the DOE's discretion to determine whether an enforcement proceeding should be initiated, settled, pursued on particular terms or terminated.

B. Pending and Future Proceedings.

DOE and the States agree:

1. *Modification of Policy.* In order to carry out its remedial authority under the ESA and EPAA, within 20 days following the date of the Approval Order, DOE will issue a

modification of the Statement of Restitutionary Policy concerning Alleged Crude Oil Violations issued on June 21, 1985 (50 Fed. Reg. 27400; July 2, 1985). DOE will publish that modification (hereinafter the Modified Policy) in the Federal Register. The Modified Policy will state that the policy of DOE is to process applications for refunds pursuant to existing Subpart V regulations and that in such administrative proceedings involving Alleged Crude Oil Violations, OHA will continue to require that each claimant must affirmatively demonstrate that it has been injured by the alleged violation and that it should therefore receive a refund. *See eg. Office of Special Counsel/Tenneco Oil Co.*, 9 DOE ¶82, 538 at 85,206 (1982). The Modified Policy will state that individuals claiming such injury may file claims but OHA will not accept claims on behalf of classes, associations or trade groups. Nothing in the Modified Policy will preclude a claimant from attempting to prove injury through the use of econometric evidence of the type that was submitted in the Stripper Well evidentiary proceedings before the OHA nor preclude OHA from using the findings contained in the Report of the Office of Hearings and Appeals, *In re The Department of Energy Stripper Well Exemption Litigation,* M.D.L. No. 378 (D. Kan., filed June 21, 1985). Nothing contained herein may be construed to amend the Subpart V regulations.

2. *Distribution of Future Funds.*

a. *Application of Policy.* The Modified Policy will also provide that, as to funds (other than the M.D.L. 378 Escrow and the DOE/Amoco Stripper Fund) for which those Persons ultimately affected by the Alleged Crude Oil Violations cannot be identified, it will be DOE's policy to exercise its remedial authority, or to recommend to any court that the court exercise its remedial authority, by paying 50 percent of such funds to the DOE, and 50 percent to the States in the proportions set forth herein on Exhibit H. The Modified

Policy will provide that all funds distributed to the States (including interest earned on the funds following their distribution to the States) shall be applied to benefit petroleum consumers in the manner described in Paragraph II.B.3.f. The States' programs shall be limited to the restitutionary programs approved by OHA in Subpart V proceedings (*see, e.g.*, Exhibit J), those referenced in DOE's Chevron consent order, the types of activities identified in the legislation enumerated in Paragraph II.B.3.f.ii(3), and any others approved by a court with appropriate jurisdiction or OHA. The Modified Policy also will provide that each State shall be entitled to expend for administrative expenses, including the payment or reimbursement of attorneys' fees, expert witness' fees, contractual obligations and other related costs incurred in connection with the States' claims with respect to Alleged Crude Oil Violations, up to the amounts permitted by Federal legislation or regulation governing comparable Federally funded programs and, where there is no such Federal legislation or regulation, up to 5 percent of the funds allocated pursuant to Exhibit H.

b. *Payment Mechanism.* The payment mechanism set forth herein shall be the exclusive means of achieving distribution of the funds. The Attorney General of each State shall deliver to the Governor of such State, for the Governor's execution, a Letter of Assurance in the form set forth in Exhibit I to this Agreement. Within 20 days following the date of the Approval Order, the Attorney General shall deliver to the Administrator of ERA, DOE, such Letter of Assurance signed by the Governor of such State. Delivery to the Administrator of ERA, DOE, of the signed, duplicate original Letter of Assurance required under Paragraph II.B.3.f of this Agreement shall constitute delivery of the Letter of Assurance required by this Paragraph. At the same time, the Attorney General of each State shall designate in writing to the DOE whether disbursement shall be by check or by wire

transfer, and if by wire transfer, shall provide instructions for the transmittal of funds. Disbursement of all funds to such State thereafter shall be in the form designated by the Attorney General and made payable to "The State of _____". Physical delivery of a check shall be made by DOE to the Attorney General and, in the case of a wire transfer, advance written notice of the date and amount of the wire transfer shall be delivered to the Attorney General prior to the sending of each wire transfer. Upon receipt of each check or wire transfer notice, the Attorney General shall deliver it promptly to the Governor of such State. As used in this Paragraph IV.B.2, "Attorney General" means the Attorney General of a State, or his or her duly authorized representative, and includes any other State official who intervened in M.D.L 378 prior to the execution of the Memorandum of Understanding of January 24, 1986 preceding this Agreement. In the case of any State where an official other than or in addition to the Attorney General intervened in M.D.L 378 prior to January 24, 1986, all references in this Paragraph IV.B.2 to the Attorney General shall mean the Attorney General jointly with such official. The Modified Policy will not require any procedures or standards other than those set forth in Paragraph II.B.3.f of this Agreement.

3. *Modification of DOE Order.* At the same time the Modified Policy is issued, DOE will take the steps necessary for issuance of an Order modifying the Order Implementing Departmental Policy Regarding Crude Oil Overcharges issued by OHA on June 21, 1985 (*50 Fed. Reg.* 27402, July 2, 1985) to provide that DOE's Modified Policy will be followed in all Subpart V proceedings involving Alleged Crude Oil Violations presently or hereafter coming under its jurisdiction.

4. *Expeditious Issuance of Orders.* DOE also will take the steps necessary to assure the expeditious issuance of orders or the filing of appropriate recommendations in all

pending cases involving Alleged Crude Oil Violations (other than M.D.L. 378), including but not limited to those listed in Exhibit K to this Agreement, except as to such cases where the DOE is not a party and except in cases specifically exempted from this Agreement, in order to distribute the funds subject to those proceedings pursuant to DOE's Modified Policy. With respect to such funds attributable to Alleged Crude Oil Violations presently in escrow under the control of the ERA, or which shall come under its control or be subject to agreements entered into by it in the future, petitions for the implementation of Subpart V proceedings or other actions to accomplish the distribution of such funds called for in this Agreement will be initiated as soon as practicable following the date of the Approval Order.

5. *Modification of PRO'S. etc.* To the extent any Order or Proposed Order with respect to an Alleged Crude Oil Violation provides for a different disposition of funds than provided by this Agreement, including DOE's Modified Policy, DOE will promptly take all steps available to implement, with respect to such Orders or Proposed Orders, the procedures and policies set forth herein; provided, however, that nothing herein shall affect any other portions of such Orders or Proposed Orders. Nothing in this Paragraph shall apply to the Amoco consent order insofar as that order applies to counting injection wells to qualify a property as a stripper well property.

6. *Future Subpart V Proceedings.* DOE further agrees that in all Subpart V proceedings involving Alleged Crude Oil Violations, OHA expeditiously will complete the processing of first stage refund claims and will issue the final decisions and orders disbursing all funds as to which those Persons ultimately affected cannot be identified pursuant to DOE's Modified Policy. OHA may reserve a reasonable portion of funds from each such proceeding to satisfy

potentially provable claims of identifiable injured claimants who have not waived their claims, but such reserve shall not exceed 20 percent of the monies in such proceeding and amounts in excess of the reserve shall be distributed while awaiting completion of the first stage refund proceedings. The percentage of the reserve will be altered within six months following the date of the Approval Order and periodically thereafter in subsequent proceedings to reflect the amount of reserve that is warranted and sufficient to provide adequate funding for eligible first-stage claims, and will be lowered as justified by claims experience as a consequence of this Agreement.

7. *Disbursement of OHA Funds.* Within 5 working days following issuance of the Modified Policy provided for in Paragraph IV.B.1, OHA will issue appropriate orders directing the disbursement of all Alleged Crude Oil Violations funds under DOE's control and available for distribution, (other than the M.D.L. 378 Escrow and the DOE/Amoco Stripper Fund) in an amount not less than $100 million, in equal shares to DOE and to the States, provided that no amount shall be distributed to a State until such State has submitted the Letter of Assurance required by Paragraph IV.B.2.b. Funds withheld from a State solely because of a failure to submit such a Letter of Assurance shall be deemed to have been disbursed to that State for the purposes of the remainder of this paragraph and an equal amount from the Assurance Fund shall be disbursed to DOE. If OHA issues such directive within the prescribed time and an amount of $50 million or more is disbursed to the States within 5 working days thereafter, the $50 million Assurance Fund from DOE's share of the M.D.L. 378 Escrow provided for in Paragraph II.B.3.e shall be disbursed to DOE. If OHA issues such directive within the prescribed time and an amount less than $50 million is disbursed to the States within 5 working days thereafter, an equal amount from the $50 million Assurance Fund from DOE's share of the

M.D.L. 378 Escrow provided for in Paragraph II.B.3.e shall be disbursed to DOE and the balance of said reserve shall be disbursed to the States without any repayment obligation. If OHA does not make any such distribution to the States, said $50 million Assurance Fund shall be disbursed to the States without any repayment obligation. Should an amount be paid to the States out of said $50 million Assurance Fund as provided above and in Paragraph II.B.3.c, for purposes of the Advance Fund repayment to be satisfied from incremental OHA disbursements, as provided in Paragraph II.B.3.c, OHA will be deemed to have made the required initial disbursement of $100 million. Disbursement of the DOE/Amoco Stripper Fund pursuant to this Agreement shall be deemed to constitute an appropriate exercise of the discretion of OHA and DOE under 10 C.F.R. Part 205, Subpart V but shall not be deemed a payment in satisfaction of OHA's $100 million obligation under this paragraph.

8. *Implementation in Other Cases.* As to pending or future government enforcement cases or declaratory judgment actions involving Alleged Crude Oil Violations, DOE will on the date of the Approval Order or at the earliest practicable date thereafter file the necessary motions, recommendations or other documents seeking immediate distribution and/or order of distribution in accordance with this Agreement. If any Person files suit to prevent or contest issuance of any notice, order, recommendation or payment under this Agreement, DOE will contest any such suit and will distribute the funds as provided in this Agreement unless barred from doing so by judicial order.

9. *Future Policy.* Consistent with the guidelines adopted by the Attorney General of the United States, "Departmental Policy Regarding Consent Decrees and Settlement Agreements", March 13, 1986, this Agreement does not limit or restrict the discretion of DOE to issue or

adopt any restitutionary policy concerning future Alleged Crude Oil Violations; provided, however, in order to resolve the remedial aspects of pending administrative and judicial proceedings involving Alleged Crude Oil Violations, that the Modified Policy will continue to apply to such proceedings pending on June 1, 1986.

V. ENTITLEMENTS LITIGATION

A. **Payments of Entitlements Settlement Funds.** The Refiners agree to allocate the Refiners Distribution of $298,514,000 to settle the pending litigation involving the January 1981 and Entitlements Adjustment Notices and certain other Entitlements Program claims as more fully provided in the Refiners Release to be executed pursuant to the Refiners Escrow Agreement. All Refiners entitled under Paragraph 5 or 8 of the Refiners Escrow Agreement to payment of money from the Sellers Account or Buyers Account, respectively, shall be paid by the Escrow Agent pursuant to such Paragraphs (hereinafter the Entitlements Disbursement) after disbursement of the Refiners Distribution or the Entitlements Disbursement funds to the Refiners Escrow Agent when (1) the Refiners Release is properly executed by that Refiner and delivered to the Escrow Agent within the time prescribed by the Refiners Escrow Agreement; (2) such Refiners Release is properly executed by each Refiner designated in Attachment C to the Refiners Escrow Agreement (hereinafter the Attachment C Releases) and delivered to the Escrow Agent within the time prescribed by the Refiners Escrow Agreement; and (3) this Agreement (a) receives Final Court Approval or (b) an order is issued pursuant to Paragraph II.B.1 of this Agreement permitting immediate disbursal to Refiners from the Refiners Escrow of the Refiners Distribution or the Entitlements Disbursement, whichever of (a) or (b) is the earlier (hereinafter Final Approval).

B. **Vacation of Entitlements Judgment.** Upon commencement of the Entitlements Disbursement, the parties agree jointly to take all appropriate steps to vacate the judgment of the district court in *Texaco Inc., et al v. Department of Energy, et al.*, 604 F. Supp. 1493 (D. Del. 1985), appeal pending Nos. 3-44 through 3-49 (Em. App.) (hereinafter *Texaco v. DOE*). If for any reason the judgment of the district court in *Texaco v. DOE* is not vacated pursuant to this Paragraph and a judgment on the merits in *Texaco v. DOE* becomes final and not subject to further appellate review (including review by the U.S. Supreme Court), such final judgment will herein be called a *Final Texaco Judgment*. If a *Final Texaco Judgment* reverses the judgment of the district court therein and requires that no further entitlements notice be issued by DOE, the Parties to the cases other than *Texaco v. DOE* listed in Paragraph V.E. below agree to dismiss such cases with prejudice.

C. **Acceptance of Funds**. Except as provided in Paragraphs III.A.4, III.B.3 and V.G, upon Commencement of the Entitlements Disbursement, and regardless whether a *Final Texaco Judgment* is issued, Refiners agree to accept such disbursements and the provisions of such Refiners Escrow Agreement as full accord and satisfaction of every claim relating to DOE's operation of the Entitlements Program for all periods covered by price and allocation controls including, but not limited to, the unissued Draft January 1981 List and Draft Cleanup List and DOE administrative actions.

D. **Buyers Relinquishment of Claims**. Effective upon commencement of the Entitlements Disbursement, and regardless whether a *Final Texaco Judgment* is issued, Refiners designated as Buyers on Attachment D to the Refiners Escrow Agreement relinquish any and all claims to the Sellers Account (other than any funds in the Sellers Account which are required to be transferred to the General

Account under the provisions of the Refiners Escrow Agreement); provided, however, that in the further event that (1) a *Final Texaco Judgment* is issued which requires DOE to issue any further Entitlement Notices, and (2) a Seller on such notices, which has not executed and delivered an acceptable Release pursuant to this Agreement, collects any monies from any Buyer which has executed and delivered an acceptable Release within the Claims Period provided for in the Refiners Escrow Agreement based on that Seller's entitlement sale right on such notices, then that Buyer will be entitled to recover from the Sellers Escrow the amount paid by that Buyer to that Seller, but no more than is allocated to that Seller on Attachment B to the Refiners Escrow Agreement and subject to the terms of Paragraph 6 of the Refiners Escrow Agreement.

E. **Withdrawal of Other Entitlements Litigation**. Within 10 days after commencement of the Entitlements Disbursement, all litigation, other than Texaco v. DOE, except as specifically excluded or reserved by Paragraphs III.B.3 and V.G, initiated by any Refiner against DOE involving any issue arising out of or involving the Entitlements Program shall be withdrawn or dismissed with prejudice and no further litigation against DOE involving any aspect of the Entitlements Program either past or future shall be instituted in any State or Federal court or agency of the United States Government, except as permitted in Paragraphs (A), (F) and (J) of the Refiners Release. Cases to be dismissed or withdrawn with prejudice shall include but not be limited to the following: *Ashland Oil v. DOE*, (W.D. Ky., Dkt. No. 81-0187L(B)); *Ashland Oil, Inc.* (FERC Dkt. No. RA 83-3-000); *Marathon Oil v. DOE* (N.D. Ohio, Dkt. No. 81-634); *Mobil Oil v. DOE* (N.D.N.Y., Dkt. No. 81-CV-340); and the cross claim of *Ashland Oil Company in Texaco v. DOE*, provided that nothing in this Agreement shall restrict or limit (1) a claim of an Entitlements Program violation by DOE

except as provided in Paragraph V.F or (2) any challenge or defense by a Refiner to such a DOE claim.

F. **Termination of Entitlements Actions by DOE.** After commencement of the Entitlements Disbursement and vacation of the judgment in *Texaco v. DOE*, DOE agrees that it shall not order the purchase or sale of any further entitlements, either through entitlements lists or as a result of any exception decisions, and shall not institute or voluntarily participate in any judicial or administrative proceedings pertaining to the publication of any further entitlements notices. After commencement of the Entitlements Disbursement and vacation of the judgment in *Texaco v. DOE*, DOE shall take no action whatsoever pertaining to entitlements obligations based on runs-to-stills or crude oil receipts after December 31, 1980, and further agrees to take no such action on the basis of any entitlements report filed by a Refiner with DOE for any reporting period after December 31, 1980, including reports filed with respect to the Entitlements Adjustment Notice (10 C.F.R. § 211.69).

G. **Preservation of Entitlements Claims.** This Agreement specifically excludes and preserves any and all claims by a Refiner applicant against DOE for payment by DOE of (i) exception relief from the crude oil Entitlements Program including, but not limited to, exceptions or adjustments based on or pursuant to *Delta/Beacon* or Naptha Entitlements relief, which has been or may be granted by the ERA, OHA, the Federal Energy Regulatory Commission, or any court or (ii) any adjustments or changes to the draft January 1981 Notice or Entitlements Adjustment Notice. This Agreement also specifically excludes any and all claims by a Refiner against DOE for interest on such adjustment or change or exception relief and for attorneys' fees and costs incurred in connection with such relief. DOE agrees to provide all funds necessary to fund and pay all amounts determined to be due

any Refiner pursuant to or as a result of any such adjustments or changes or relief including such interest and attorneys' fees, if awarded, out of its share of funds under this Agreement, or out of funds (other than funds resulting from violations or alleged violations except Alleged Crude Oil Violations) to which no other Party has a claim by virtue of this Agreement. DOE's obligations shall not affect the amount or timing of any payment to any other Party made pursuant to this Agreement.

H. **Entitlements Settlement Contingency.** In the event of a *Final Texaco Judgment* which requires DOE to publish entitlements notices, the DOE reserves the right to recoup from any Refiner which received exception relief funded pursuant to Paragraph G, the amount of that exception relief to the extent such entitlements notice provides a duplicate funding of such relief by affecting the entitlements position of such Refiner, and provided further that the Release executed by each Refiner shall remain effective, in accordance with and subject to the terms, provisions and exceptions set forth therein.

VI. MISCELLANEOUS

A. **Agreement Binding.** The provisions of this Agreement, which shall include the Exhibits hereto as though fully set forth in the text hereof, shall be binding upon (1) all the Parties hereto and (2) all Persons executing waivers or releases pursuant to this Agreement, and with respect to such Parties and Persons, their Affiliates, subsidiaries, member-patrons and their owners, and their member-patrons and their owners, officers, agents, attorneys and any other Persons while acting under their direction or control. As used herein, an "Affiliate" of any Party includes any Person (and the successors and assigns of such Person) which controls, is controlled by or is under common control with such Party. For this purpose, "control" means the power (existing on the Payment Date), by contract, partnership agreement, stock

ownership or otherwise, to control the policies and business operations of a Person, including, without limitation, the ownership, directly or indirectly (through one or more intermediaries), of shares of stock having the right to elect a majority of the Board of Directors of a corporate Person, or the ownership (on the Payment Date), directly or indirectly (through one or more intermediaries), of more than 49 percent of a Person.

B. **Support of Agreement.** The Parties to this Agreement shall support approval of all of its provisions, shall take all steps and make all filings necessary to its implementation at their own expense or from their respective Escrow funds. DOE will undertake the defense of this Agreement in response to any litigation, in which DOE is named as a party, challenging this Agreement or any action required to be taken by DOE pursuant thereto. However, DOE's agreement to this provision does not circumscribe the discretion of the Attorney General to authorize or preclude the filing of particular pleadings or the making of arguments by DOE in any litigation, and this Agreement shall not create any right of action against DOE concerning the initiation, continuation or conduct of any litigation. All Parties agree to cooperate (1) in defending this Agreement and (2) in any action required to be taken pursuant thereto in any litigation challenging its validity. All Parties also agree that they will fully support the procedures and policies set forth herein in all present and future proceedings involving Alleged Crude Oil Violations and, to the extent any counsel approving the form and content of this Agreement by signature hereon enters an appearance in any such proceeding, counsel will not oppose or do anything inconsistent with such policies and procedures, the terms of this Agreement or any orders pursuant thereto. Any Party may enforce this Agreement against any other Party but this Agreement confers no such enforcement right upon any non-Party hereto.

C. **Non-Crude Oil Cases.** By its terms, this Agreement (except Part V hereof) applies only to Alleged Crude Oil Violations funds. Nothing in this Agreement shall operate to the detriment of any Party or claimant in a non-crude oil refund case. The Parties agree that in cases involving (1) both Alleged Crude Oil Violations and other violations resulting in refunds or (2) violations, other than Alleged Crude Oil Violations, resulting in refunds, Alleged Crude Oil Violations funds will not be substituted for funds resulting from other violations or vice versa. OHA will continue to utilize its existing adjudicative policies and procedures as to funds involved in non-crude oil cases, *see, e.g., Office of Special Counsel*, 10 DOE § 85,048 (1982) and *Standard Oil Co. (Indiana)*, 11 DOE § 85,185 (1983), including the selection of an appropriate second stage restitutionary remedy which reflects the geographical incidence of injury, and OHA will not be prevented from freely exercising this discretionary authority in the future.

D. **Ongoing Formula.** This Agreement constitutes the determination of an ongoing formula for the allocation of second stage Alleged Crude Oil Violations funds between DOE and the States. As a result of this Agreement, the parties now believe there is no need for legislation regarding the disposition of such funds, including legislation that may have been proposed in the past. This Agreement is subject to applicable law.

E. **Standing.** Nothing in this Agreement shall confer, diminish or alter, as a matter of law, the rights of a Party to intervention or standing in any pending or future judicial or administrative proceeding involving Alleged Crude Oil Violations, in which a Party asserts an interest not inconsistent with, and not based upon, the provisions of this Agreement.

F. **No Prejudice.** In the event that this Agreement does not receive Final Court Approval, it shall be null and void and of no force and effect. If this Agreement fails to receive Final Court Approval, the fact that any Party executed this Agreement or any release provided for herein shall not be used for any purpose to prejudice such Party's position in any pending or future litigation or other proceeding. This Paragraph shall not be operative so long as there is continuing litigation seeking approval of this Agreement or an appeal therefrom. Upon Final Court Approval, this Agreement shall remain effective irrespective of the final action in *Texaco v. DOE*.

G. **Captions**. Captions used herein are for convenience only and shall have no substantive effect.

H. **Counterparts.** This Agreement may be executed in several counterparts which shall all be considered one Agreement.

IN WITNESS WHEREOF THE PARTIES HAVE EXECUTED THIS AGREEMENT AS OF THE DATE FIRST ABOVE STATED.

Citation
51 FR 27899-01
1986 WL 104786 (F.R.)
(Cite as: 51 FR 27899)

NOTICES

DEPARTMENT OF ENERGY

Statement of Modified Restitutionary Policy in Crude Oil Cases

Monday, August 4, 1986

***27899** AGENCY: Department of Energy.

ACTION: Statement of modified restitutionary policy to be implemented in crude oil cases.

SUMMARY: The Department of Energy (DOE) is announcing an amendment to its policy concerning the exercise of its remedial authority under the Emergency Petroleum Allocation Act (EPAA), as amended, 15 U.S.C. 751 et seq., in crude oil cases. This policy supersedes the policy announced at 50 FR 27400 on July 2, 1985. Under the policy announced today, the DOE will implement special refund proceedings under 10 CFR Part 205, Subpart V (Subpart V) in crude oil cases, as discussed below. The funds in those proceedings will be distributed as follows: Up to 20 percent of the funds will be reserved for the payment of claims of eligible parties, and the balance will be divided between the states, territories and possessions of the United States (States), and the U.S. Treasury, as indirect restitution to unidentified injured parties. This revision of DOE's restitutionary policy will permit members of the public to seek restitution, and provide significant sums to the States and the U.S. Treasury for the benefit of all citizens, and thus better serve the public interest than current policy.

FOR FURTHER INFORMATION CONTACT: Carl A. Corrallo, Solicitor, Economic Regulatory Administration,

RG-40, 1000 Independence Avenue SW, Room 3H-017, Washington, DC. 20585, 202-252-4387.

SUPPLEMENTARY INFORMATION: The DOE issues this policy statement to modify the Statement of Restitutionary Policy concerning the disposition of crude oil violation refund amounts issued on June 21, 1985 (50 FR 27400, July 2, 1985). Under this Modified Statement of Restitutionary Policy, DOE will exercise its remedial authority under the EPAA in crude oil enforcement cases to provide persons claiming to have been injured by crude oil violations the opportunity to prove injury, and to distribute funds in excess of the amount necessary for the satisfaction of such claims to parties in a manner that achieves indirect restitution: One half of these funds will be distributed to the States, in proportion to their relative consumption of refined petroleum products during the period of price controls, and one half will be distributed to the U.S. Treasury.

Background

This Modified Restitutionary Policy Statement (Statement) is issued in conjunction with the approval on July 7, 1986, of the Settlement Agreement (Agreement) dated May 21, 1986, by the District Court for the District of Kansas (Court) in The Department of Energy Stripper Well Exemption Litigation, M.D.L. No. 378. The previous Statement of Restitutionary Policy was also issued in conjunction with M.D.L. 378. See 50 FR. 27400.

The history of M.D.L. 378 is best summarized in the Court's Memorandum and order of September 13, 1983:

This action is a consolidation of a number of cases brought by oil producers to enjoin the Federal Energy Administration (FEA), now the Department of Energy (DOE), from enforcing Ruling 1974-29, concerning low production oil wells, commonly called "stripper wells." The Court enjoined

enforcement of the regulations in question, but ordered the oil producers to deposit into escrow the difference between the stripper well price and controlled price of crude oil affected by the injunction. As of October 31, 1982, the escrow fund, including interest, contained over one billion dollars.

The issue of the validity of the regulations and Ruling was finally settled in In re the Department of Energy Stripper Well Exemption Litigation, 690 F. 2d 1375 (Em. App. 1982), cert. denied, [459 U.S. 1127] (1983), in which the Temporary Emergency Court of Appeals (TECA) reversed this Court's decision and upheld the rulings and regulations as valid. TECA remanded this action to this Court with instructions to enter judgment for DOE, which judgment has been entered. The effect of TECA's decision is to declare the funds deposited in escrow to be overcharges recovered due to violations of the petroleum pricing regulations. The remaining task is the appropriate dispensation of the escrowed funds . . . .

578 F. Supp. 586,589.

On September 13, 1983, the Court granted DOE's motion to refer the issue of who may have been injured by the overcharges to the DOE Office of Hearings and Appeals (OHA) to conduct fact-finding concerning who bore the impact of the overcharges at issue in the Stripper Well case. The Court also ordered all parties with claims on the escrow to submit specific proof thereof to OHA. The Court also solicited DOE's view on the proper means of restitution in this case.

On December 30, 1983, OHA published in the Federal Register a public notice concerning the referral decision (48 FR 57608). That notice discussed the background of this litigation, OHA's preliminary views on the question of injury and specifically requested comments on the impact of the overcharges on Entitlements Program participants, direct purchasers of refined products, resellers, and consumers.

OHA received over 100 separate comments, including comments from many entities or groups which were not then parties to M.D.L. 378.

On May 9, 1984, OHA published another public notice in the Federal Register, announcing its decision to hold an evidentiary hearing on the issue of tracing the impact of the overcharges on direct purchasers of this crude oil and on participants in the Entitlements Program (49 FR 19718). A full twenty-two days of hearings followed during a three-month period. Sixty-four public and private entities and groups consisting of thousands of members participated actively in the hearings. Over thirty witnesses testified and a record of almost 13,000 pages of written and oral presentations was compiled, including 185 exhibits and 23 briefs. Expert witnesses testified as to the effect of oil overcharges upon the consuming public. Econometric evidence (economic studies relying on mathematical and statistical methods) was introduced regarding the specific ***27900** injury to the various parties in the economic chain from producer to consumer.

On June 21, 1985, the first part of the report was submitted to the Court by OHA. Report of the Office of Hearings and Appeals, In Re: The Department of Energy Stripper Well Exemption Litigation, M.D.L. No. 378 (D. Kan.) (OHA Report). Based on the expert testimony and evidence presented, OHA determined that it was impossible to trace those increased costs through an individual refiner's refining, distribution and marketing operations. However, based on the econometric evidence presented to it, OHA found that refiners were injured, as a class, by 2.7 to 8.1 percent of the overcharges because of their purchases of crude oil, and that the balance of the overcharges were passed on to subsequent purchasers of refined products. Thus, while downstream customers bore, in the aggregate, between 91.9

and 97.3 percent of the overcharge, the injury to individual consumers could not be accurately determined.

On June 21, 1985, DOE submitted to the Court the second part of its report in the form of a Statement of Restitutionary Policy applicable to all crude oil overcharge, funds. That policy statement, and an implementing order by OHA, were published in the Federal Register on July 2, 1985. 50 FR 27400 and 27402. In the policy statement, DOE announced that, in light of OHA's findings, it would be DOE policy to retain all funds received in crude oil cases in escrow pending Congressional action, and that, if Congress did not act by the end of the current session, i.e., Fall 1986, the funds would be paid to the U.S. Treasury. Thereafter, Judge Theis presented the parties the opportunity to file statements in opposition to the OHA Report.

It was in that context that the parties discussed the settlement of the issue of the disposition of the Court's escrow. In view of the similarity of restitutionary problems confronting the agency in other crude oil cases, and the uniform treatment of all such cases in the policy statement, DOE concluded that the settlement negotiations provided an appropriate vehicle for exploring the resolution of those issues in all crude oil cases.

The Court and OHA had allowed wide-spread participation on the question of disposition of the escrowed funds, and had compiled an extensive record based on the submissions of the parties. The private parties represented the interests of refiners, marketers and major consumers of petroleum products, i.e., Resellers, Retailers, Airlines, Agricultural Cooperatives, Surface Transporters (Trucks, Buses and Cabs), and Utilities. The public parties, the States and DOE, which have been the beneficiaries of indirect restitution in other crude oil cases, also played very active roles. Thus, the parties possessed the necessary expertise and a broad range of interests to assure that the private interests,

and the pubic interest, were recognized.

The Settlement Agreement in the Stripper Well case, which preceded this Policy Statement, was the result of seven months of extensive arms-length negotiations among the various public and private interests to determine an appropriate distribution of the funds escrowed by the Court. In arriving at a compromise, every aspect of the receipt and distribution of the funds by each of these parties was thoroughly debated and subsequently approved by the Court. The negotiations took into account the expected recovery of future funds by DOE in the Stripper Well and other crude oil cases in fashioning the distribution of funds in the Court's escrow, and examined the anticipated benefits to refiners, marketers and other purchasers including consumers. The Parties reached a settlement and presented their Agreement to the Court on May 22, 1986. On July 7, the Court approved the Settlement Agreement, holding that the Agreement "is fair, reasonable and adequate to all concerned parties" (Slip Op. at 19) and that "the agreement promotes the public interest in a very broad sense." (Slip Op. at 25). The Court directed entry of final judgment with regard to "each and every matter that is compromised, settled or otherwise resolved by the Settlement Agreement, as modified by the Court's opinion and order dated July 7, 1986."

The Agreement, as modified by the judgment, resolves a number of matters. Among them are the distribution of funds collected by the Court, and the distribution of funds collected by DOE in other cases. As to the distribution of funds subject to the Court's jurisdiction in M.D.L. 378, the Agreement establishes a mechanism through individual escrow agreements for each of the groups receiving funds from the Stripper Well escrow, i.e., Resellers of refined product; Retailers of gasoline and diesel fuel; Agricultural Cooperatives; domestic Airlines; oil-fired Utilities; Surface

Transporters (fleet operators of trucks, buses and taxis); and Rail and Water Transporters (railroads and operators of barges and American flag vessels).

Each group will receive a portion of the funds held in escrow by the Court in M.D.L. 378 to distribute further pursuant to the terms of their individual escrow agreements. The amounts each group will receive under the Agreement includes an amount in anticipation of the crude oil violation funds DOE believes it will recover in the future. As a result, as a condition to submitting a claim to a refund from any of the above escrows, all claimants will be required to sign a waiver releasing any claims they may have against all other crude oil funds.

The Agreement also provides a mechanism for resolving the distribution of crude oil overcharges in all other cases. This Statement is part of the implementation of the terms of the Agreement which provides a mechanism for the consideration of claims for restitution by purchasers of petroleum products in other crude oil enforcement cases. It applies to the agency's consideration of claims by purchasers of crude oil or refined petroleum products for restitution from the funds collected in other crude oil cases. It addresses the distribution of crude oil violation funds obtained in cases alleging violations of the regulations governing the first sale of crude oil (10 CFR Part 212, Subpart D), the crude oil reseller regulations (Part 212, Subpart F and L), and the entitlements regulations (10 CFR 211.66, 211.67, 211.69). The identification and adjudication of the violation in such cases is unaffected by this Statement.

It is anticipated that the Settlement Agreement will resolve, by payments from the M.D.L. 378 funds and accompanying waivers, the vast majority of claims of individual purchasers of crude oil or refined petroleum products. The Agreement also provides that any restitutionary

funds not distributed to, or reserved for the claims of, private claimants will be divided between the States and the Federal government, as representatives of the energy consuming public.

Individual Claims for Refund

With respect to individual refund claims, the Agreement provides parties which did not settle or receive funds on M.D.L. 378 the opportunity to present their claims to OHA under the existing OHA Subpart V refund regulations at 10 CFR Part 205. Under the Agreement, OHA will establish an initial reserve fund for these claims of twenty percent of all funds subject to Subpart V proceedings involving alleged crude oil overcharges. The remaining eighty percent will then be divided between the States and the U.S. Treasury, as described below. Accordingly, the policy applicable to crude oil overcharges cases announced on July 2, ***27901** 1985, is modified to permit the utilization of the current Subpart V regulations, without amendment, to allow individuals and firms to apply for refunds.

OHA will conduct special refund proceedings in accordance with the rules and procedures established in 10 CFR Part 205, Subpart V. Applicants that received refunds in M.D.L. 378 may not file applications, since they will have waived this right as a condition of receiving payment from the M.D.L. 378 funds. All applicants for refunds pursuant to the Department's Subpart V regulations must demonstrate injury as a result of any alleged crude oil violations. The requirement of a demonstration of injury is established in OHA precedent. See, e.g., Office of Special Counsel/Tenneco Oil Co., 9 DOE 82,538 at 85,206 (1982). Applicants for refunds may seek to prove injury through the use of econometric evidence of the type submitted to OHA and OHA may use the findings contained in the OHA Report when reviewing claims.

Consistent with OHA precedent in Subpart V proceedings, OHA will not accept applications for refunds on behalf of classes, associations or trade groups. OHA has previously determined that claims by similar groups are inappropriate in the "first stage" claims process in which OHA reviews claims of direct injury, because they amount to proposals for "indirect" restitution, i.e., to distribute the funds attributable to unidentified parties. Standard Oil Company (Indiana)/ Diesel Automobile Association, 11 DOE 85,250 (1984).

Restitutionary Distribution to States and DOE

This Statement also alters the restitutionary policy involving the distribution of crude oil overcharge funds attributable to unidentified injured purchasers. The DOE policy heretofore contemplated Congressional action to distribute escrowed funds. DOE has concluded that where it is impossible to trace the effects of violations in order to make direct restitution to the specific persons injured by them, the overcharge monies should be divided by distributing one-half of such funds to the States and depositing the remaining half in the U.S. Treasury. The allocation among the States will be based on the consumption of refined petroleum products within each State during the period of price controls, September 1973 through January 27, 1981. In addition to the fifty states, the District of Columbia the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa and the Northern Marianas will receive distributions of crude oil finds.

Such an indirect restitutionary plan was suggested by the Stripper Well Court in its 1983 Memorandum and Order. Indeed, the Court remarked that it "believes that the equitable goals of restitution would mandate distribution to the state governments or the federal government for use in programs designed to aid energy consumers." 587 F. Supp. 586, 594.

Further, a distribution of crude oil overcharge funds to the States for indirect restitutionary purposes was upheld last year by the TECA in United States v. Exxon Corp., 773, F.2d. 1240 (Em. App. 1985), cert. den., 106 S. Ct. 892 (1986), reh'g den. 54 U.S.L.W. 3663 (Apr. 7, 1986). TECA found in Exxon that the disbursement to the States for the benefit of injured citizens would be "equitable, and fair, and a reasonable method of compensating the public", where identification of victims is impossible. The Agreement also provides for payments directly to the United States Treasury which will "benefit the public." Payne 22 v. United States, 762 F.2d. 90, 94 (Em. App. 1985). As the Court has stated, a payment to the Treasury will fulfill the restitutionary goal of requiring that judicially determined illegal gains are fully disgorged. 578 F. Supp. at 594.

This policy will be implemented by equally distributing to the States, and to DOE for deposit in the Treasury, eighty percent of all crude oil funds. The remaining twenty percent will be set aside for claims of direct injury. Any balance remaining after the first stage is completed will also be paid to the States and DOE. For all overcharge funds in judicial proceedings where injured persons cannot be readily identified, DOE will recommend to the court that it take action to achieve the distribution of the funds in a manner consistent with this Statement.

Under the terms of the Agreement and the Restitutionary Policy announced today, the States must apply the funds received to benefit the citizens of their States. The States may fund (1) programs approved by OHA in Subpart V proceedings; (2) those programs referenced in the consent order which DOE entered into in 1981 with Standard Oil Company of California (Chevron) (46 FR 52221; October 26, 1981); (3) the types of energy conservation activities set forth in the following legislation:

(a) Part A of the Energy Conservation and Existing Buildings Act of 1976 (relating to weatherization of buildings; 42 U.S.C. 6861 et seq.);

(b) Part D of Title III of the Energy Policy and Conservation Act (relating to primary and supplemental State energy conservation programs; 42 U.S.C. 6321 et seq.);

(c) Part G of Title III of the Energy Policy and Conservation Act (relating to energy conservation for schools and hospitals; 42 U.S.C. 6371 et seq.);

(d) The National Energy Extension Service and Conservation Act (relating to the promotion of conservation by small business and individuals; 42 U.S.C. 7001 et seq.); and

(e) The Low-Income Home Energy Assistance Act of 1981 (relating to assisting the poor with home utility bills; 42 U.S.C. 8621 et seq.); and (4) such other restitutionary programs as may be approved by the District Court in the Stripper Well case or by OHA. All such funds paid to the States (including interest earned on such funds following distribution to the States) must be applied to benefit petroleum consumers in those States. The States must use funds received to supplement funds available under Federal or State law.

The direct participation of the States in the distribution of overcharge funds is one means of providing the consuming public with restitution. Such State involvement assures that the local needs of the various States are more directly and effectively addressed. By according each State broad discretion in selecting the programs that best meet the needs of its particular citizens, the Agreement, and this Statement,

allow the States to benefit various categories of petroleum consumers who may not receive direct refunds under the Agreement. In order to more directly involve consumers, each State will

The States have agreed to consider the specific needs of low-income consumers and to consult with low-income group representatives in formulating plans to expend overcharge funds. Similarly, the States have agreed to provide Indian tribal governments and their citizens within their geographical boundaries an equitable share of benefits from State restitutionary programs and consider the unique requirements of the various tribal groups in reviewing their grant application. Finally, the Governor of each state will provide a Letter of Assurance to the Court and to the DOE that all overcharge funds will be ***27902** expended solely in accordance with the Agreement and the terms outlined above.

Funds Affected

As indicated above, the policy announced here is a result of the Court's judgment approving the distribution of funds in the Stripper Well Litigation pursuant to the Settlement Agreement. The funds escrowed in that case will be distributed pursuant to other provisions of the Settlement Agreement which was approved by Judge Theis on July 7, 1986. The mechanism for distribution in the Settlement Agreements consists of individual escrow agreements for each of the groups receiving funds from the Stripper Well escrow. Each individual escrow provides for the disbursement of the funds received to members of that group through a claims fund. Each of the Escrow Agreements established under the Settlement Agreement provided for an Administrator. The Administrator is required to provide notice to members of the eligible group of the applicable procedures for filing a claim and instructions on where to obtain a claim form. At the present time, DOE is also holding monies in escrow obtained

from other crude oil cases. This Modified Restitutionary Policy Statement will immediately apply to distribution of those funds through the implementation of, or completion of pending, Subpart V proceedings. In light of the releases, waiving and releasing any claims to future crude oil funds, executed by the number of parties participating under the Agreement, it is anticipated that relatively few claims will be submitted in the remaining proceedings. Accordingly, as already noted, DOE will reserve at amount of the funds received in crude oil cases for the satisfaction of direct claims and distribute the balance to the States and DOE. At the outset, DOE will reserve twenty percent of the funds received for direct claims, and will reevaluate that amount based on OHA's experience in receiving claims under this policy. Thus, as funds are received in future cases, DOE may distribute a greater portion of the funds received immediately to the States and DOE.

Conclusion

The policy announced today, in conjunction with the Settlement Agreement in the Stripper Well case, is expected to result in the expeditious consideration of claims in crude oil cases, the reduction of challenges to the distribution of funds in such cases, and a reduction of the litigation that has surrounded this issue in the past. Claimants who may not have had the opportunity to recover funds under the Settlement Agreement may file claims in OHA's Subpart V proceedings, and residual funds will be made available immediately to benefit the citizens of the States and the United States.

This policy is effective immediately and will apply to all funds held in escrow in pending crude oil cases as well as to future receipts of funds in such cases.

Issued in Washington, DC, July 28, 1986:

Joseph F. Salgado,

Under Secretary of Energy.

[FR Doc. 86-17454 Filed 8-1-86; 8:45 am]

BILLING CODE 6540-01-M

51 FR 27899-01, 1986 WL 104786 (F.R.)

END OF DOCUMENT

Citation
52 FR 11737-02
1987 WL 129856 (F.R.)
(Cite as: 52 FR 11737)

DEPARTMENT OF ENERGY

Office of Hearings and Appeals

Implementation of Special Refund Procedures

Friday, April 10, 1987

***11737** AGENCY: Office of Hearings and Appeals, Department of Energy.

ACTION: Notice explaining procedures for processing refund applications in crude oil refund proceedings under 10 CFR Part 205, Subpart V.

SUMMARY: This notice considers the comments received by the Office of Hearings and Appeals (OHA) in response to its August 8, 1986 order implementing the Department of Energy's modified policy for restitution of crude oil overcharges, notice of which was published in 51 FR 29689 (August 20, 1986). DOE's new policy was issued in connection with the settlement of the DOE Stripper Well Exemption Litigation, MDL No. 378 (D. Kan.). The policy specifies that 20 percent of crude oil overcharges will be set aside to satisfy refund claims and 80 percent will be disbursed to the state and federal governments for indirect restitution. This notice analyzes the comments and explains the procedures which the OHA will follow in processing applications filed under the DOE's Subpart V regulations for refunds of the crude oil overcharge funds.

FOR FURTHER INFORMATION CONTACT: Thomas 0. Mann, Deputy Director, Roger Klurfeld, Assistant Director, Office of Hearings and Appeals, 1000 Independence Avenue,

SW., Washington, DC 20585, (202) 586-2094 (Mann); (202) 586-2383 (Klurfeld).

SUPPLEMENTARY INFORMATION: As part of the settlement approved in the Department of Energy Stripper Well Exemption Litigation, MDL No. 378 (D. Kan.), the DOE agreed to revise its restitutionary policy for crude oil overcharge cases. Accordingly, the DOE issued a Statement of Modified Restitutionary Policy in Crude Oil Cases on July 28, 1986. 51 FR 27899 (August 4, 1986) (hereinafter referred to as the "MSRP"). The MSRP announces a refund process for restitution of crude oil overcharges using the special refund procedures codified at 10 CFR Part 205, Subpart V. DOE will reserve initially 20 percent of crude oil overcharge funds to satisfy claims and disburse 80 percent of the funds to the State and Federal governments for indirect restitution. The DOE's Office of Hearings and Appeals (OHA) will accept and process refund applications from persons who can show they were injured by crude oil overcharges. After all valid claims are paid, unclaimed funds will be divided equally between the State and Federal governments. The Federal government's share of the unclaimed funds will be deposited into the general fund of the Treasury of the United States.

On August 8, 1986, the OHA issued an order announcing its intention to apply DOE's modified policy in all present and future Subpart V proceedings involving alleged crude oil violations. Refund proceedings then pending before the OHA to which the MSRP applies were listed in the Appendix to the order. Notice of the August 8 order was published at 51 FR 29689 (August 20, 1986). The order provided a period of 30 days for the filing of any objections to the application of the MSRP, and solicited comments concerning appropriate procedures to follow in processing refund applications in crude oil refund proceedings. In addition, the order stated that Applications for Refund may

now be filed, and noted that it is not necessary to file applications in each of the refund proceedings listed in the Appendix.

The August 8 order summarized the OHA's preliminary view of the type of refund process and procedures that would be appropriate in the crude oil cases:

We expect that many potential claimants in the oil industry itself--refiners, resellers ***11738** and retailers--will waive their claims for crude oil refunds in Subpart V proceedings and elect instead to take refunds under one of the escrow funds established under the settlement. In addition, most members of certain groups of petroleum product consumers who are participating in the settlement can also be expected to waive their Subpart V rights: surface transporters (buses, trucks and taxis), water transporters, railroads, airlines and oil burning electric utilities. However, other large consumers of petroleum products that are not covered by one of the escrow accounts established under the settlement are now in a position to file claims. It is likely on the basis of existing OHA precedent in the refund area that refunds made to successful claimants will be calculated according to a volumetric method, in which the amount of money available will be appropriated over all gallons of produce sold. See 48 FR 57608 (1983). It is also likely that small consumers will not receive refunds, since any refunds they receive will be smaller than the cost of processing their applications. We seek comments on the appropriateness of applying these precedents in crude oil refund proceedings.

51 FR at 29691.

The present notice considers the comments which the OHA received in response to the August 20 notice, and provides further guidance to assist claimants who wish to file refund applications for crude oil moneys under the Subpart V regulations.

I. Background

Before considering the comments, this notice provides a general background discussion. The DOE uses Subpart V proceedings to make refunds of oil overcharge funds to injured persons. See 44 FR 8566 (February 9, 1979). In the crude oil area, early Subpart V decisions permitted injured persons to file claims, and proposed to devide the remaining crude oil overcharge funds among the states, based on their proportionate consumption of refined petroleum products. Office of Enforcement, 9 DOE 82,521 (1982) (Alkek); see also Office of Enforcement, 9 DOE 82,553 (1982) (Adams); Office of Special Counsel, 10 DOE 85,048 (1982) (Amoco); A. Johnson & Co., Inc. 12 DOE 85,102 (1984) (A. Johnson). Although more than 60 claims were initially filed (mostly by refiners) in these early cases, major policy questions were unresolved, and these claims were not decided by OHA before the recent crude oil settlement. On September 13, 1983, the United States District Court in Kansas referred the question of who was injured and in what amounts by the crude oil overcharges in the Stripper Well proceeding to the OHA for fact-finding. The court also solicited DOE's view on the proper means of restitution in the case. 578 F. Supp. 586 (D. Kan. 1983). In its decision to refer the matter to OHA, the court observed that although each party had a strong opinion on what remedy was best, there were no facts in the record on which to base a decision. 578 F. Supp. at 595.

After announcing procedures and some tentative conclusions, OHA held an evidentiary hearing over a 22-day period between June and October 1984. Sixty-four public and private entities participated in the evidentiary proceedings. The OHA accumulated a record of nearly 13,000 pages of written and oral testimony.

On June 21, 1985, the OHA submitted its fact-finding report to the court. Report of the Office of Hearings and

Appeals, In Re: The Department of Energy Stripper Well Exemption Litigation, Fed. Energy Guidelines 90,507 (June 19, 1985). The OHA Report concluded that it was generally impossible to trace the overcharges through any particular refiner's marketing system, and no methodology had been suggested which even attempted to accomplish this result. However, using sophisticated econometric techniques, some reasonable assumptions, and evidence in the record showing the movement of refined product prices in relation to crude oil costs over time, OHA was able to arrive at conclusions with a high degree of certainty regarding injury at the refiner level. The OHA determined that domestic refiners as a class absorbed between 2.7 and 8.1 percent of the crude oil overcharges, and that refiners passed on the remainder to the national petroleum distribution network and to consumers (end-users) of petroleum products by increasing the prices of the refined petroleum products which they sold.

DOE also submitted its 1985 crude oil refund policy statement to the court. It recommended that restitution to parties injured by crude oil overcharges should not be attempted, and that the Stripper Well overcharges be placed in escrow and held until the fall of 1986. As a practical matter, DOE's 1985 policy statement placed a moratorium on the processing of claims for restitution which had already been submitted to OHA in crude oil Subpart V cases. As noted in the MSRP:

It was in that context that the parties to MDL 378 discussed the settlement of issues pertaining to the disposition of the court's escrow. In view of the similarity of restitutionary problems confronting the Department in other crude oil cases, and the uniform treatment of all such cases in the 1985 policy statement, DOE concluded that the settlement negotiations provided an appropriate vehicle for exploring the resolution of those issues in all crude oil cases.

51 FR 27899 at 27900 (August 4, 1986).

The settlement which led to DOE's modified restitutionary policy was the result of seven months of extensive negotiations among the various public and private interests to determine an appropriate disposition of crude oil overcharge funds. The scope of the settlement was extremely broad. It applies to the following three different types of crude oil overcharges:

It addresses the distribution of crude oil violation funds obtained in cases alleging violations of the regulations governing the first sale of crude oil (10 CFR Part 212, Subpart D), the crude oil reseller regulations (10 CFR Part 212, Subparts F and L), and the entitlements regulations (10 CFR 211.66, 211.67, 211.69).

51 FR 27899 at 27900. Moreover, it considered the interests of all potential crude oil claimants: Those who were parties to the court case, MDL 378, and others who were injured by crude oil overcharges. Finally, it applies to crude oil moneys in the MDL 378 escrow, to crude oil moneys now in the DOE escrow, and to crude oil moneys obtained in other pending administrative and court proceedings.

For claimants who were parties to MDL 378, the settlement establishes a mechanism through individual escrow accounts for each group to receive a portion of the funds from the Stripper Well escrow, including refiners, resellers of refined petroleum products, retailers of gasoline and diesel fuel, agricultural cooperatives, domestic airlines, investor-owned utilities, surface transporters (fleet operators of trucks, buses and taxis), and rail and water transporters (railroads and operators of barges and American flag vessels). While the amounts each group will receive under the settlement were arrived at through negotiations, they were based on the sum of crude oil violation funds already collected plus the amount DOE believes it will recover in the future.

For purposes of the settlement that total amount was estimated to be $4 billion. Consequently, as a condition to submitting a claim for a refund from any of these escrows, claimants are required to sign a waiver releasing any claims they might have against all other crude oil overcharge funds. The settlement also provides a mechanism--implemented in DOE's MSRP--for other claimants to file for a refund from crude oil overcharges. Under the MSRP, those other persons will be allowed to submit refund claims ***11739** to the OHA under Subpart V, and they will be paid from funds collected by the Department in crude oil cases other than MDL 378. OHA will establish an initial reserve fund for these claims of up to 20 percent of all crude oil overcharge funds subject to Subpart V proceedings. The remaining 80 percent, and any unclaimed funds, will be divided between the State and Federal governments as representatives of the energy-consuming public.

II. Discussion of Comments Received

A. Introduction

In response to our publication of the August 8, 1986 order implementing the MSRP in the Federal Register, 51 FR 29689 (Aug. 20, 1986), the Office of Hearings and Appeals received eleven comments. Those submitting comments were: Farmers Union Central Exchange, Inc. (CENEX); the Transit Authority Refund Claimants Task Force; the American Public Transit Association; the Washington Metropolitan Area Transit Authority; Energy Watch, Inc.; System Fuels Inc.; a group of Ocean Carriers (I); the National Air Transportation Association; Philip P. Kalodner; various States, Territories and Possessions of the United States; and a second group of Ocean Carriers (II).

In general, the comments were brief since it was already made clear in the MSRP and the OHA's August 8, 1986 order implementing the MSRP that the crude oil refund process will

be modeled after the process the OHA has used to evaluate claims based on refined product overcharges in previous Subpart V cases. Indeed, this has been confirmed in decisions issued by OHA since the August 8, 1986 order. As in non-crude oil cases, applicants will be required to document their purchase volumes and to demonstrate that they were injured by the alleged overcharges. The standards for showing injury which the OHA has used in analyzing claims for petroleum product overcharge funds will also apply to claims based on crude oil overcharges. See, e.g., Mountain Fuel Supply Co., 14 DOE 85,475 (1986), citing Dorchester Gas Corp., 14 DOE 85,240 (1986). Refunds to successful claimants will be calculated on the basis of a volumetric refund amount derived by dividing the crude oil overcharge moneys by the total United States consumption of petroleum products during the period of price controls (August 1973 through January 1981).

Next, we will discuss matters addressed in the comments that merit general attention. We will also consider a number of case-specific matters raised by individual commenters. Finally, for general guidance we will summarize the procedures OHA will apply in crude oil refund proceedings under Subpart V.

B. Pre-existing Subpart V Cases

The first area to consider concerns the manner in which the new crude oil restitutionary policy will apply to "pre-existing" crude oil Subpart V cases. This group consists of over 300 individual refund proceedings, including three large consolidated decisions (Adams, Alkek and A. Johnson) and the crude oil portions of "global" settlements (such as Amoco). These proceedings were announced several years before the settlement and the MSRP. The claims period in those cases has long since expired. However, as Ocean Carriers I have pointed out, no claims have yet been paid

pursuant to those Subpart V procedures because of "major uncertainties as to DOE's policy for making refunds." Ocean Carriers I Comment at 4. They maintain that those proceedings should be reopened because of the fundamental change in DOE's crude oil refund policy reflected in the MSRP. Many consumers, including the Ocean Carriers, did not file individual claims in these proceedings, and in light of DOE's stated policy not to accept claims, it would have made little sense for them to do so. Ocean Carriers I Comment at 5. The States take the opposite position, contending that the early Subpart V crude oil cases should not be reopened for new claims, and that all moneys attributable to those cases be immediately paid out to the states and federal government as unclaimed funds. States Comment at 4. We agree that these cases should be reopened. The purpose of these Subpart V proceedings has always been to make equitable restitution to persons injured by crude oil overcharges, see 44 FR 8566 (February 9, 1979), and the OHA has authority under the governing regulations to issue ancillary orders to ensure that restitution is achieved. 10 CFR 205.288. That purpose should not now be frustrated by foreclosing direct restitution in these proceedings solely because of the passage of time Moreover, the period for end-users to file claims in these proceedings was never formally "opened." See, e.g., Alfred B. Alkek, 9 DOE 82,521, at 85,136; see also Adams Resources and Energy, Inc., 9 DOE 82,553; Amoco Brand Committee, 10 DOE 82,556. OHA will therefore issue supplemental orders reopening the claims process in these proceedings. Notice of these actions will be published in the Federal Register.

C. Size of Reserve and Timing of Payments

In a related area, a number of commenters expressed opinions on the size of the reserve which the OHA should maintain for the payment of crude oil refund claims. Comments from potential claimants urged OHA to reserve

more than 20 percent of the funds to avoid a possible shortfall in the amount required for payments to injured persons. However, the settlement permits only downward adjustment of the reserve from the initial 20 percent figure. The States advocated that less than 20 percent of the crude oil Subpart V funds be reserved for claimants. Since the OHA has had no experience in the crude oil refund area since the issuance of the MSRP, we believe that any action to adjust the reserve at this time would be premature.

We have also received comments that addressed the timing of payments under the Subpart V process, both to applicants and to state and federal governments. Commenters who represent potential applicants urge OHA to consolidate all crude oil refunds into one lump sum payment. The States press for immediate distribution of all moneys representing refunds to the states for indirect restitution. It is too early in the Subpart V process for the OHA to be able to make any definitive statements about the timing of refunds. It is clear that we are faced with a "rolling" process in which moneys will flow into and out of the escrow account as settlements are made and refunds determined. OHA will adhere to the Subpart V regulations which govern this process in order to give reasonable notice to the public of proposed refund procedures and to allow for the submission of applications for refund. Amounts not reserved for claims will be distributed promptly to State and Federal governments.

D. Calculation of Refunds

The next matter concerns the calculation of refund amounts in crude oil cases. [FN1] The August 8, 1986 order ***11740** contemplated using a volumetric method for allocating the overcharges among each gallon of refined petroleum products sold in the United States during the period of federal price controls. That allocation would be made by dividing crude oil overcharge moneys ("the numerator") by the total

U.S. consumption of petroleum products during the period of price controls ("the denominator"). 51 FR at 29691. See Mountain Fuel, 14 DOE 85,475 (1986); A. Tarricone, Inc., Case No. KEF-0049 (proposed decision, September 23, 1986). Comments generally supported the volumetric approach, and because of its virtues we have determined that it should be followed in these cases. The volumetric approach presumes that alleged crude oil violations were spread equally and therefore increased the price of all gallons of petroleum products, rather than attempting to tie violations to any specific transactions. In fact, nearly all of the funds involved in these proceedings were obtained through consent orders in which no actual violations were conceded. Moreover, during the period of price controls the Entitlements Program widely dispersed the impact of crude oil overcharges among domestic refiners, and caused the market price of all petroleum products to increase. See generally OHA Report. For these reasons, the volumetric method offers the fairest and most reasonable method for apportioning the crude oil overcharges involved over the products sold in the United States during the period of controls. The volumetric approach is also efficient, having been used by the OHA in hundreds of prior Subpart V refund proceedings involving refined petroleum products, and we conclude that it is equally suited for the crude oil area.

FN1 It should be noted that the method of calculating refunds relates only to the fair allocation of funds in the reserve to claimants to make restitution for the injury they suffered. Cf. Petroleum Overcharge Distribution and Restitution Act of 1986, Pub. L. 99-509, section 3003(b) (Subpart V proceedings should establish the amount of injury claimants experienced from oil overcharges). This discussion has nothing to do with the amount of money that is reserved to pay claims, which was discussed at a previous point in this notice.

Both groups of Ocean Carriers maintained that the volumetric calculation should be modified in certain respects. First, Ocean Carriers I claimed that the denominator used by DOE in the cases cited above was inflated because it included petroleum consumption for the entire years 1973 and 1981. This is not correct. As we stated in Mountain Fuel, the denominator is "an estimate of the number of gallons of petroleum products consumed in the United States during the period August 1973 through January 1981 (2,020,997,335,000)." 14 DOE at 88,868 n.4 (emphasis added). Second Ocean Carriers I and II contended that "the only fair way to calculate the volumetric refund amount is to include in the numerator all monies attributable to crude oil overcharges, including the Stripper Well monies." Ocean Carriers I Comment at 9; see also Ocean Carriers II Comment at 10. [FN2] They reasoned that since the denominator includes all refined products, and therefore crude oil, consumed in the United States during the period, it would be inconsistent and unfair if the numerator did not reflect all crude oil overcharges related to that consumption. The Carriers contend that the claimants in these Subpart V proceedings were injured by the Stripper Well overcharges just as much as by the crude oil overcharges of the many firms listed in the appendix to the August 20, 1986 Federal Register notice. For this reason, they contend that their refunds should take that injury into account. Id.

FN2 The Transit Authority Refund Claimant Task Force makes a similar argument, urging OHA to deduct from the denominator the volumes of refined products sold to the groups of MDL 378 parties for whom specific escrow accounts were established in the settlement. Although this type of adjustment has some appeal, it would be too difficult to implement as a practical matter. All of the volumes that passed through petroleum product resellers and retailers were ultimately consumed by end-users, some of whom may apply

for refunds themselves, and this could produce double or even triple counting of volumes. Because of these difficulties, accurately adjusting the number of gallons in the denominator might delay the crude oil refund process for several years. That result would defeat one of the principal purposes of the settlement: achieving an expeditious resolution of all crude oil refund claims.

For the reasons explained below, we think the Ocean Carriers position has considerable merit on both theoretical and practical grounds. To be equitable, restitution in Subpart V crude oil proceedings should reflect the amount of injury suffered from all crude oil overcharges, regardless of their source. The volumetric method bases the calculation of refunds on an apportionment of crude oil overcharges over each gallon of product consumed in the United States during the period of price controls. These crude oil overcharges had the same general effect--they all caused the market price of each gallon of petroleum products to increase. Since the denominator includes all gallons of products consumed during controls, a fair volumetric apportionment should attempt to include in the numerator all alleged crude oil overcharge moneys received (including those that will be received in the future, assuming a reasonable degree of certainty as to the amount of future recoveries). In fact, this methodology was followed in the Stripper Well settlement, which addressed crude oil violation moneys contained in both the MDL 378 escrow and the DOE escrow, as well as DOE's estimated recovery of additional crude oil overcharges in the future, and provided for a joint resolution of refund claims based on those overcharges. The sum of these amounts--$4 billion--was the starting point for determining how much each group of parties to MDL 378 would receive in the settlement. Refunds to injured persons who were not parties to MDL 378, or non-waiving parties, are paid from the DOE escrow. [FN3] As stated by Judge Theis, the settlement agreement provides "an

opportunity in special refund proceedings pursuant to 10 CFR Subpart V for non-settling [non-l- waiving claimants to submit any claims of injury from an alleged crude oil violation." In Re: The Department of Energy Stripper Well Exemption Litigation, MDL No. 378 (D. Kan., July 7, 1986) (opinion and order approving settlement), skip op. at 13.

FN3 Different groups of claimants are to receive restitution either from the MDL 378 escrow or from another escrow account. Refunds to refiners and members of other groups that were parties to MDL 378 are paid from the MDL 378 escrow.

In order to treat Subpart V claimants on a fair restitutionary basis, the volumetric calculation must recognize that the total amount of all crude oil overcharges (including future recoveries) is much larger than the amount in each specific case made subject to Subpart V proceedings. In fact, use of only the crude oil overcharge amount available in each specific case made subject to Subpart V proceedings results in the smallest possible per-gallon allocation of crude oil overcharges. As discussed below, additional crude oil overcharge amounts can be included in the numerator. These different numerator amounts result in a range of possible volumetric overcharge calculations that could be used in crude oil Subpart V proceedings.

The highest volumetric calculation would include all crude oil overcharges collected and to be collected in the future. For purposes of the settlement negotiations, that amount was estimated to be $4 billion. This number included crude oil overcharge moneys from several sources: (i) The amount then in the DOE escrow; (ii) the amount in the MDL 378 escrow; and (iii) the amount of estimated future recoveries. That figure could even be increased by an additional $2 billion to account for the crude oil overcharges determined in United States v. Exxon Corp., 561 F. Supp. 816

(D.D.C. 1983). Inclusion of the Exxon overcharges would produce a total crude oil overcharge recovery figure of $6 billion and yield the highest volumetric overcharge in the range, approximately $0.003 per gallon of petroleum products purchased.

*11741 Inclusion of the entire $4 billion in total estimated recoveries alone, while excluding the Exxon overcharges, yields an overcharge amount of approximately $0.002 per gallon. This is the second highest figure in the range. The next largest refund formulation would take the $4 billion figure of estimated total recoveries, reduce it by $415 million--the amount being refunded in MDL 378 to firms in the petroleum product distribution chain (refiners, resellers and retailers)--and would yield an overcharge amount of approximately $0.0018 per gallon.

Another approach would be to include the $1.4 billion in the MDL 378 escrow at the time of settlement, minus the $415 million refunded to refiners, resellers and retailers, or $985,000,000, plus the crude oil overcharges that were in DOE's escrow account at the time of the settlement. The sum of these two figures is $1,654,662,389 which yields an initial volumetric overcharge amount of approximately $0.0008 per gallon. Under this formulation, as additional crude oil violation amounts are received in the future the volumetric overcharge amount would be increased. This "full party" approach would eliminate the need to consider any questions of "upstream" overcharge absorption by the refiners, resellers and retailers who supplied products to end-user claimants, since the amount of injury attributed to those intermediaries in the distribution chain is excluded from the numerator. Finally, the lowest possible overcharge allocation in the range would exclude the Stripper Well overcharges entirely and include in the numerator only the amount of crude oil overcharges in the DOE escrow account at the time of the settlement

($669,662,389). This yields a volumetric overcharge of approximately $0.0003 per gallon.

Some of the volumetric formulations in the range described above have evident drawbacks. For example, the circumstances of the Exxon litigation can be distinguished, since the remedy devised by the District Court--refunds to state governments for the benefit of all consumers--was already completed before the Stripper Well settlement was concluded. In contrast, the lowest number (about one-tenth of the largest number in the range) is small in comparison and may not accurately reflect the level of injury suffered by Subpart V claimants. It clearly does not treat Subpart V claimants on a par with parties who received restitution from the MDL 378 escrow, since it would use a different, much smaller number for total crude oil overcharge recoveries. Cf. Petroleum Overcharge Distribution and Restitution Act of 1986, Pub. L. 99-509, section 3003(b) (Subpart V proceedings should establish the amount of injury claimants experienced from oil overcharges). Use of the smallest number in the range would also be most likely to produce repetitive claims and the need for administrative reprocessing because claimants would have to reapply for additional refunds as DOE received additional crude oil moneys.

We have concluded that the "full parity" method described above best achieves the restitutionary objectives of the settlement and should be used to calculate the volumetric overcharge amount in crude oil proceedings under Subpart V. This would produce a current volumetric refund amount of $0.0008 per gallon. The "full parity" approach compensates refund recipients in MDL 378 and in Subpart V proceedings on an equal footing and most fairly and equitably effectuates restitution for the injury they suffered as a result of crude oil overcharges.

It is also the most administratively efficient for Subpart V proceedings since it tends to eliminate repetitive reapplications and obviates the need to consider nettlesome questions of "upstream" overcharge absorption by middlemen in the oil distribution chain.

E. Standards for Showing Injury

The next area of general interest concerns the standards for showing injury in crude oil refund proceedings under Subpart V. Several commenters advocated the use of the well-established presumption of injury for end-users (ultimate consumers), provided their business was unrelated to the petroleum industry. Others submitted comments that urged OHA to use presumptions of injury for resellers and retailers based on those adopted in various major refiner refund proceedings. A number of comments urged OHA to follow Subpart V precedents and permit claimants to use estimates to establish the number of gallons of petroleum products purchased. Related comments requested guidance on whether it was necessary for applicants to identify their suppliers in order to receive a refund. Finally, the States contend that Paragraph IV.B.1 [FN4] of the Settlement Agreement bans the use of these presumptions in Subpart V proceedings, and requires end-user claimants to submit detailed evidence of injury in order to receive refunds for crude oil overcharges.

FN4 Paragraph IV.B.1 provides as follows:

B. Pending and Future Proceedings. DOE and the States agree:

1. Modification of Policy. In order to carry out its remedial authority under the ESA and EPAA, within 20 days following the date of the Approval Order, DOE will issue a modification of the Statement of Restitutionary Policy concerning Alleged Crude Oil Violations issued on June 21, 1985 (50 FR 27400; July 2, 1985). DOE will publish that

modification (hereinafter the Modified Policy) in the Federal Register. The Modified Policy will state that the policy of DOE is to process applications for refunds pursuant to existing Subpart V regulations and that in such administrative proceedings involving Alleged Crude Oil Violations, OHA will continue to require that each claimant must affirmatively demonstrate that it has been injured by the alleged violation and that is should therefore receive a refund. See e.g. Office of Special Counsel/Tenneco Oil Co., 9 DOE 82,538 at 85,206 (1982). The Modified Policy will state that individuals claiming such injury may file claims but OHA will not accept claims on behalf of classes, associations or trade groups. Nothing in the Modified Policy will preclude a claimant from attempting to prove injury through the use of econometric evidence of the type that was submitted in the Stripper Well evidentiary proceedings before the OHA nor preclude OHA from using the findings contained in the Report of the Office of Hearings and Appeals, In re The Department of Energy Stripper Well Exemption Litigation, M.D.L. No. 378 (D. Kan., filed June 21, 1985). Nothing contained herein may be construed to amend the Subpart V regulations.

The OHA intends to apply relevant precedents established in the petroleum product refund area to crude oil Subpart V proceedings. The States are incorrect in claiming that Paragraph IV.B.1 supports the position that no presumptions are to be permitted in crude oil Subpart V proceedings. To the contrary, Paragraph IV.B.1 specifically indicates that the settlement does not amend the Subpart V regulations. Section 205.282(e) of these regulations explicitly provides for the use of appropriate presumptions of injury in any Subpart V claim, and OHA has employed presumptions in thousands of refund cases since 1981. Presumptions are necessary because the Department's primary restitutionary policy is to pay injured persons, i.e. to do direct restitution. To achieve this, refund procedures must take account of the

complexity of oil overcharge proceedings, difficulty in actually proving an overcharge, passage of time, difficulties in locating records and relevant market data, and the agency's expertise in the structure of the industry and its functioning during the period of controls. The Settlement Agreement itself took account of these factors and did not require any party to the Stripper Well Litigation to provide proof of injury in order to receive a refund. The settlement specified that there shall be a Subpart V claims process for injured persons who were not parties to the Stripper Well Litigation. The imposition of new standards for proof of injury *11742 would be inconsistent with this provision.

The Tenneco decision cited in the settlement established procedures for distributing funds remitted by the firm pursuant to a DOE consent order. The Tenneco refund procedures incorporated several different kinds of presumptions. For example, firms that had already received refunds directly from Tenneco were presumed to be ineligible for further refunds from OHA. 9 DOE 82,538 at 85,201. Spot purchasers of Tenneco products were also presumed to be ineligible for refunds under Subpart V. Id. End users were not required to show they absorbed any overcharges in order to receive a refund. 9 DOE 82,538 at 85,202. Under the Tenneco standard an end-user had only to prove its volume of purchases from Tenneco in order to establish injury and receive a refund. See, e.g., Tenneco Oil Co./Defense Logistics Agency, 9 DOE 82,588 (1982). This is the same standard that OHA will apply in deciding crude oil refund claims submitted by end-users under Subpart V. The States' position confuses the requirement of showing absorption of overcharges, which was applied to refiners and resellers in adjudicating refund claims under Subpart V for refined petroleum product overcharges, with the different standard applied in those proceedings to end-users. Refiners and resellers (unlike end-users of refined petroleum products) had the opportunity

under DOE statutes and regulations to pass through overcharges in the prices of the same products resold within the same regulated industry. Far from supporting the States' position, the page of the Tenneco decision cited in the Settlement Agreement does not relate at all to end-user claimants, but deals instead with Entitlements Program participants, i.e. refiners, and allocation claimants. [FN5] Id. at 85,206. Thus, the language on which the States rely is irrelevant to the treatment of end-user claimants. Id.

FN5 In fact, the page of the Tenneco decision cited in the Settlement Agreement specifically provides that allocation claimants "need not conclusively establish all of the elements of a violation on Tenneco's part and resulting injury on the claimant's part." 9 DOE at 85,206. Instead, "an applicant should submit enough information to demonstrate that its claim is not spurious, including the best available evidence of the injury which was sustained by the claimant." Id.

The States' position is insupportable as a matter of common sense as well. Under the presumptions we are adopting for crude oil refunds, end-users (ultimate consumers) whose businesses are unrelated to the petroleum industry need establish only the volume of petroleum products they purchased during the controls period to prove that they were injured by crude oil overcharges; they do not have to submit any further evidence to prove that they absorbed the overcharges. This policy furthers important practical goals. Analysis of the impact of crude oil overcharges on end-users is beyond the scope of a refund proceeding. See Office of Enforcement: In the Matter of PVM Oil Associates, Inc., 10 DOE 85,072 (1983) at 88,308. End-users generally were not subject to price controls and were not required to keep records which justified selling price increases by reference to cost increases. If, for example, a brick manufacturer filed a claim for a refund on the fuel oil it purchased during the period

August 1973 through January 1981, it is only reasonable to conclude that the firm was harmed by the amount of the crude oil overcharges allocated to the fuel oil which it used to manufacture bricks. Performing an economic analysis of the effect of the overcharges on the price of bricks would be duplicative. [FN6] Using the approach advocated by the States would be costly and inefficient and would mean that virtually no end-users would receive restitution for the crude oil overcharges they suffered. See Greater Richmond Transit Co., 15 DOE 85,028 at 88,050.

FN6 By contrast, petroleum refiners and resellers had the opportunity under DOE statutes and regulations to pass through increased costs of refined petroleum products by raising the prices of the very same products that they charged to their customers. Since regulated firms in the petroleum industry were required to keep records showing how their cost increases justified price increases, OHA has generally examined the question of absorption versus passthrough when considering large refund applications submitted by these firms.

This standard for end-users has recently been described in a shorthand fashion as a "presumption of injury," but its use was based on the practical considerations noted above, a factor also underlying the standard for proving injury from antitrust violations (courts do not attempt to determine whether first purchasers were able to "pass on" the effects of the violation). [FN7] See Additional Comments of Philip P. Kalodner at 5-20, summarizing the development of OHA caselaw regarding refunds to end-user claimants. All of the presumptions we are adopting are rebuttable, and any interested party can submit evidence to show that a refund applicant in fact was able to pass on the crude oil overcharges or is not otherwise eligible to receive the refund which it seeks.

FN7 See Hanover Shoe, Inc. v. United Machine Corp., 392 U.S. 481 (1968); Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). This approach to end-user claims has also been applied to private enforcement actions brought under section 210 of the Economic Stabilization Act. Eastern Airlines, Inc. v. Atlantic Richfield Co., 609 F.2d 497 (Temp. Emer. Ct. App. 1979). Three matters mentioned above deserve further discussion. The first question is whether applicants must identify their suppliers and prove their exact gallonage to receive refunds. In view of the finding in the OHA Report that crude oil overcharges increased the prices to consumers of all domestic petroleum products, applicants need not identify their suppliers in order to receive refunds. OHA Report, Fed. Energy Guidelines 90,507 at 90,620. For purposes of these crude oil overcharge proceedings, it matters only that the applicant purchased petroleum products in the United States market during the period August 1973 through January 1981. Following OHA precedent, reasonable estimates of purchase volumes will be permitted.

The second question is whether the presumptions of injury for resellers and retailers used in recent refined product Subpart V cases, such as Marathon Petroleum Co., 14 DOE 85,269 (1986), should be permitted in crude oil refund proceedings. See, e.g., Energy Watch Comment. These presumptions will not apply here. Applicants for crude oil refunds must show injury. 51 FR at 27901. There is an important distinction between product refund cases under Subpart V and crude oil cases which is particularly relevant to this issue. In a case like Marathon, in which refunds are made for alleged overcharges in sales of refined products, the overcharges were confined to purchasers of Marathon products, and the presumptions of injury for Marathon resellers reflect this fact. By contrast, market prices for refined products generally increased when crude oil

overcharges occurred, and all resellers--regardless of their suppliers--were therefore affected by crude oil overcharges.

Accordingly, a reseller or retailer must submit additional evidence to show the extent to which it absorbed crude oil overcharges. Under the circumstances, resellers and retailers will not be permitted to use presumptions to show they were injured in crude oil refund cases. These classes of applicants may, however, use the type of econometric evidence that was submitted to OHA in the Stripper Well proceeding to show that they were injured by crude oil overcharges. 51 FR at 27901; Petroleum Overcharge Distribution and Restitution Act of 1986, Pub. L. 99-509, section 3003(b)(2).

Finally, we should note that utilities have been permitted to receive refunds in Subpart V refund proceedings only to ***11743** the extent that they notify the applicable state regulatory body and pass on the entirety of the refund to their retail customers. For example, in A. Tarricane, Inc./Consolidated Edison Company of New York, Inc., 15 DOE 85,038 (1986), the utility received a refund based upon its purchases of product after it had certified "that as a regulated utility it will notify [the state utility commission] of any refund received and will also pass such refund on to its retail customers on a dollar for dollar basis." 15 DOE at 88,074. To receive a refund in any crude oil refund proceeding, a regulated utility will have to submit a similar certification.

F. Case-Specific Comments

We will next direct our attention to two case-specific comments that were received in response to the August 20, 1986 Federal Register notice. The first of these comments was submitted by CENEX, and the second was submitted by the National Air Transportation Association (NATA).

CENEX is a large regional agricultural cooperative headquartered in St. Paul, Minnesota, whose members include local cooperatives located throughout the northern tier states. One of the Subpart V crude oil cases, No. HEF-0359, involves an April 1981 consent order between CENEX and DOE which settled in alleged $0.13 per barrel posted price violation by the cooperative for $150,000.

Refund procedures for the CENEX consent order were established in A. Johnson, 12 DOE 85,102 (1984), and the funds will be subject to claims under the MSRP. CENEX claims that consolidating the CENEX consent order funds with all other crude oil moneys in DOE's escrow is improper since the oil was used by its refineries, and any overcharges from the posted price violation were not dispersed by the Entitlements Program, but borne exclusively by its member cooperatives. CENEX asserts that despite the waivers it has executed to receive MDL 378 refunds (both as a refiner and a cooperative) which released all claims against crude oil moneys subject to Subpart V, its members were the only one injured by its posted price violations, and it should be allowed to filed a claim for crude oil refunds.

We do not believe that the position taken by CENEX is correct; however, we will not in this notice make a final determination on any claim. As a party to MDL 378, CENEX agreed to the consolidation of all types of alleged crude oil violations for purposes of the settlement and the MSRP, even though it knew or should have known that the funds in OHA Case No. HEF-0359 would be subject to general claims, rather than refunded exclusively to its members. See 51 FR at 27900 (settlement "addresses the distribution of crude oil violation funds obtained in cases alleging violations of the regulations governing the first sale of crude oil . . . . "). In our view, CENEX must live with the consequences of its participation in the settlement negotiations. The releases which it must

execute to receive refunds from the MDL 378 escrows clearly indicate that the firm waives its Subpart V claims. CENEX (and any of its members) may nevertheless file claims for portions of the Subpart V crude oil moneys, and we will consider their arguments in detail at that time. It should be obvious from the foregoing, however, that CENEX and its members have a substantial burden to prove that they should receive crude oil refunds under Subpart V. The NATA is a national trade association representing the resellers of aviation fuels known as "fixed base operators." According to NATA, most of its members are planning to take refunds from MDL funds through the resellers escrow, and they will be required to waive their claims against the Subpart V moneys. However, NATA points out that some of its members also operate flight schools and air taxis in which they are end-users of aviation fuel. NATA's comment asked OHA to advise it whether its "dual purchaser" members waive their right to file for Subpart V refunds if they obtain an MDL 378 refund from the resellers escrow. It seems clear that the NATA resellers which elect to file for resellers escrow refunds waive their rights to file for Subpart V refunds as end-users, based on the language of the Resellers Notice of Settlement and the actual text of the resellers waiver and withdrawal of claims provisions in the Settlement Agreement at Exhibit B. Moreover, this position was also stated by former ERA Solicitor Carl A. Corrallo in the June 12, 1986 hearing on the settlement before Judge Theis. See Transcript of June 12, 1986 Hearing, MDL No. 378 (D. Kan.) at 23-34. Likewise, in the July 7, 1986 order approving the settlement, Judge Theis indicated the court's view that "all parties and claimants receiving funds under the agreement will waive any further claims to crude oil refunds." In Re: The Department of Energy Stripper Well Exemption Litigation, MDL No. 378 (D. Kan., Jul. 7, 1986) (opinion and order approving settlement), slip op. at 13. The court also stated that the claims procedures established for the various

MDL 378 escrows adequately compensated parties for the claims they waived. Id. at 22. As noted above, the MSRP and the OHA's August 8, 1986 order implementing the MSRP also state that MDL 378 parties who execute waivers cannot also apply for refunds under Subpart V.

III. Summary of Crude Oil Refund Procedures

The guidelines which follow provide a general summary of the standards which the OHA will apply in crude oil refund proceedings, under Subpart V. It should be recognized, however, that under those regulations, standards and procedures governing the evaluation of refund claims must be contained in a final Decision and Order issued pursuant to 10 CFR 205.282(c) and published in the Federal Register. All Subpart V refund proceedings involving alleged crude oil violations where the claims deadlines have expired before issuance of the MSRP will be reopened for claims by issuance of appropriate orders in the near future. All cases involving alleged crude oil violations where a Proposed Decision and Order establishing procedures has been issued will be finalized pursuant to s 205.282(c). It is likely that funds from many different cases will be consolidated to maximize the administrative efficiency of the process. See, e.g., A. Tarricone, Inc., Fed. Energy Guidelines 90,060 (proposed decision, September 23, 1986) (consolidation of 28 cases). OHA will accept and process refund applications from persons who claim they were injured by alleged crude oil violations. Because the process is new, adequate notice to the public of the opportunity to submit claims is important. 10 CFR 205.283(b). Although no deadline will be established in this notice for the submission of claims or the payment of refunds, final Decisions and Orders in these cases will set deadlines for the submission of refund applications. Amounts not reserved for the payment of claims will be distributed to State and Federal governments.

As in non-crude oil cases, applicants will be required to document their purchase volumes and demonstrate that they were injured. See Mountain Fuel Supply Co., 14 DOE 85,474 (1986). Following Subpart V precedent, reasonable estimates of purchase volumes may be submitted. Greater Richmond Transit Co., 15 DOE 85,028 (1986). Applicants who were end-users (ultimate consumers) of petroleum products whose businesses are unrelated to the petroleum industry and who were not subject to the DOE price regulations are presumed to have absorbed rather than passed on alleged ***11744** crude oil overcharges, and need not submit any further evidence of injury beyond volumes of product purchased in order to receive a refund. Id. It is not necessary for applicants to identify their supplier of petroleum products in order to receive a refund. Resellers and retailers of petroleum products must submit detailed evidence of injury, and may not use presumptions of injury established by OHA in refund cases involving refined petroleum products. They can, however, use econometric evidence of the type used in the OHA Report to the District Court in the Stripper Well litigation, MDL No. 378 (D. Kan.), Fed. Energy Guidelines 90,507 (June 19, 1985), and OHA intends to use the Report in evaluating refund applications submitted under Subpart V. Parties to MDL 378 who received refunds from one of the escrows established in the settlement will have waived their rights to apply for crude oil refunds under Subpart V.

Refunds will be calculated using a volumetric method in which the amount of crude oil overcharge funds will be divided by the total United States consumption of refined petroleum products during the period of price controls (August 1973-January 1981). The numerator of this volumetric refund calculation will include the $1.4 billion in the MDL 378 escrow at the time of the settlement, minus the $415 million refunded to refiners, resellers and retailers, or $985 million, plus the crude oil overcharges in DOE's escrow account at the

time of the settlement. As indicated earlier, the latter amount is $669,662,389. The sum of these two figures is $1,654,662,389, which yields an initial volumetric refund of approximately $0.0008 per gallon. This calculation is subject to further adjustment as additional crude oil moneys become available in the DOE escrow and are made subject to the crude oil claims process.

No application forms will be provided. Instead, end-users should submit the material outlined below in the form of a letter. The letter should include the following information: (a) A short description of the applicant's business and use of petroleum products; (b) the total number of gallons of domestic petroleum products used during the period August 19, 1973 through January 27, 1981 broken down by product; (c) an explanation of how the applicant obtained the volume figures above; (d) a statement that the applicant, its parent firm, affiliates, etc., have not elsewhere waived their right to a refund; and (e) if the applicant did business under more than one name or a different name during the period of price controls, a list of the names which it used. Resellers and retailers should submit all of the information outlined above, plus additional evidence to show that the applicant was injured, i.e. that it did not pass all overcharges through to its own customers. The telephone number for a contact person who can answer questions about the application should be provided, and the letter should indicate the name and address of the person who should receive the refund check. The application should be typed or printed, and mailed to the following address:

Subpart V Crude Oil Overcharge Refunds, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585. A current taxpayer identification number or Social Security number must also be included in the letter. Applicants may be

required to submit additional information to document their refund claims.

Under the MSRP, up to 20 percent of the alleged crude oil violation amount may be reserved for the payment of claims to injured persons. For the present time, OHA has decided to reserve the entire 20 percent to ensure that adequate funds will be available for refunds. The remaining 80 percent of the funds will be disbursed to state and federal governments for indirect restitution under the formulae governing those disbursements which are specified in the Settlement Agreement. However, those funds are subject to the same reporting requirements as all other crude oil moneys received by the States under the settlement.

Dated: April 6, 1987.

George B. Breznay,

Director, Office of Hearings and Appeals.

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No. 97-794

In the Supreme Court of the United States

OCTOBER TERM, 1997

CONSOLIDATED EDISON COMPANY OF NEW YORK, ET AL., PETITIONERS

v.

FEDERICO PEÑA, SECRETARY OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners have no right to judicial review of the sufficiency of the amounts reserved for individual crude oil overcharge claims from funds recovered by the Department of Energy in public enforcement actions under the former Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.* (1982).

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In the Supreme Court of the United States

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No. 97-794

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 117 F.3d 538. The opinion and order of the district court (Pet. App. 25a-30a) is reported at 4 Energy Mgmt. (CCH) ¶ 26,698.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1997. A petition for rehearing was denied on August 15, 1997. Pet. App. 31a-33a. The petition for a writ of certiorari was filed on November 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In response to the oil embargo by OPEC (Organization of Petroleum Exporting Countries), Congress enacted the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 751 *et seq.* (1982). Under the EPAA, which incorporated by reference portions of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. 1904 note (1976), the Department of Energy (DOE) and its predecessor, the Federal Energy Authority, issued price control orders governing the sale and resale of crude oil, in amounts and at prices specified in the regulations.

The oil price control regime remained in place until January 1981, when the President ended it by executive order. Executive Order. No. 12287, 46 Fed. Reg. 9909 (1981). The EPAA expired by its own terms on September 30, 1981. 15 U.S.C. 760g (1982). A savings provision, however, preserved enforcement proceedings based on acts committed or liability incurred prior to the expiration date. 15 U.S.C. 754(a)(2) (1982). The DOE's authority to collect overcharges was subsequently repealed, barring actions commenced after September 30, 1988, or six years after the alleged price control violation, whichever was later. 15 U.S.C. 4504(a) (1988).

The EPAA incorporated Sections 207, 209, 210 and 211 of the administrative and enforcement scheme of the ESA. 15 U.S.C. 754(a)(1) (1982). Under Section 207, "functions exercised under this title are excluded from the operation of subchapter II of chapter 5, and chapter 7 of title 5, United States Code." 12 U.S.C. 1904 note (1976). Congress thus withdrew the general cause of action conferred by the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, 701 *et seq.*, from

claimants under the EPAA. As for enforcement, Section 209 authorized the government to obtain "restitution of moneys received in violation" of the DOE's price controls. 12 U.S.C. 1904 note (1976). A companion provision, Section 210, provided a separate private cause of action for persons to recover money damages (including treble damages) for violations of the price control regulations. *Ibid.* Section 211 of the ESA provided, in relevant part, that "district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder," and created the Temporary Emergency Court of Appeals with exclusive appellate jurisdiction in such cases. *Ibid.*

2. The DOE's public enforcement program, carried out under Section 209 of the ESA, recovered large sums of crude oil overcharges. The DOE initially employed a variety of remedies pursuant to its enforcement powers, such as compelling restitution by means of refunds to first purchasers, *Midwest Petroleum Co.* v. *United States Dep't of Energy*, 760 F.2d 287 (Temp. Emer. Ct. App. 1985); payments to the United States Treasury, *Payne 22, Inc.* v. *United States*, 762 F.2d 91, 94 (Temp. Emer. Ct. App. 1985); payments in kind to the Strategic Petroleum Reserve, *Champlin Oil Co.*, 47 Fed. Reg. 49,703 (1982); and payments to state energy programs, *United States* v. *Exxon Corp.*, 773 F.2d 1240, 1286 (Temp. Emer. Ct. App. 1985), cert. denied, 474 U.S. 1105 (1986).

In 1986, pursuant to a settlement in protracted multi-district litigation, the DOE adopted a uniform restitutionary policy for cases involving crude oil overcharges. *In re Department of Energy Stripper*

Well Exemption Litig., 653 F. Supp. 108, 112-114 (D. Kan. 1986), aff'd, 855 F.2d 865 (Temp. Emer. Ct. App. 1988). Under the *Stripper Well* settlement, the DOE agreed to establish individual escrow accounts for the parties to the litigation, which allowed them to receive a portion of the funds that had been collected by the DOE up to the time of *Stripper Well*. In return, the parties were required to waive all existing and future claims to any other crude oil overcharges recovered by the DOE. *Id.* at 114.

With respect to pending and future crude oil claims by non-parties to the *Stripper Well* settlement, such as petitioners here, the DOE agreed to issue a modification of its restitutionary policy. The modification would allow victims of overcharges to seek restitution by submitting claims to DOE in refund proceedings pursuant to the agency's Subpart V procedures. See 653 F. Supp. at 114; 10 C.F.R. Pt. 205. To pay such claims, the settlement agreement authorized the DOE to reserve up to 20 percent of all crude oil overcharge funds that the agency recovered in enforcement proceedings.[1] Under the agreement, the remaining 80 percent of funds collected are to be divided equally between the States and the federal government to be used for indirect restitution to

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[1] See Order Implementing Modified Statement of Restitutionary Policy Concerning Crude Oil Overcharges, 51 Fed. Reg. 29,689, 29,691 (1986). As the DOE explained, the approach "anticipated that the Settlement Agreement w[ould] resolve, by payment from the stripper well funds and accompanying waivers, the majority of claims of individual purchasers of crude oil or refined petroleum products, and the 20 percent reserve, which is subject to downward adjustment, should therefore be more than sufficient to pay claimants." *Id.* at 29,690.

unidentified injured parties.[2] See Settlement Agreement, IV B, 1, 2, 3, 6, *reprinted in* 17 DOE ¶ 90,509 (1988).

Shortly after the *Stripper Well* settlement was approved, Congress enacted the Petroleum Overcharge Distribution and Restitution Act of 1986 (PODRA), 15 U.S.C. 4501 *et seq.* (1988). The PODRA governs all funds collected by the DOE pursuant to its responsibilities under Section 209 of the ESA, *except* crude oil refunds that are governed by the *Stripper Well* settlement agreement.[3]

The DOE implemented the *Stripper Well* settlement by issuing the required Statement of Modified Restitutionary Policy For Crude Oil Cases, 51 Fed. Reg. 27,899 (1986), announcing the DOE's intention to follow the modified policy in crude oil refund proceedings under Subpart V. DOE solicited comments concerning the appropriate procedures to be employed in such cases, *id.* at 29,689 (1986), and subsequently issued a "Notice Explaining Procedures for Processing Refund Applications in Crude Oil Refund

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[2] Such indirect restitution is required in crude oil overcharge cases because, under DOE's former Entitlements Program, the cost of all crude oil, including overcharges, was effectively spread among all refiners and ultimately to all purchasers in the United States. See *Exxon Corp.*, 773 F.2d at 1274, 1280-1286; *In re Seneca Oil Co.*, 906 F.2d 1445, 1448 (10th Cir. 1990).

[3] The PODRA does not apply to "any amount to which any person or class of persons has an enforceable right * * * governed by the terms and conditions of the settlement approved on July 7, 1986, in In Re: the Department of Energy Stripper Well Exemption Litigation, M.D.L. No. 378, in the United States District Court for the District of Kansas * * *." 15 U.S.C. 4501(c) (1988).

Proceedings Under 10 C.F.R. Part 205, Subpart V," 52 Fed. Reg. 11,737 (1987).

The 1987 notice implementing the policy agreed upon in *Stripper Well* provides for a "rolling" refund process in which moneys flow in and out of the reserve fund as overcharge settlements are collected and refund claims are processed. 52 Fed. Reg. at 11,739. The DOE recovers overcharges in enforcement actions and sets aside 20 percent of those funds as an account for future individual claims. The remaining portion is distributed to the States and the federal treasury for indirect restitution. *Id.* at 11,737. Parties who purchased crude oil during the price control years may file overcharge claims. The DOE determines whether a claim has merit and the amount of oil purchased by a party. The DOE then refunds to successful claimants a certain amount of money per gallon of oil purchased. *Id.* at 11,738-11,740.

The amount refunded per gallon is calculated according to the "volumetric method," by dividing the total crude oil overcharge moneys currently available by the total U.S. consumption of petroleum products while price controls were in effect. 52 Fed. Reg. at 11,740. The DOE considered various alternative methods of setting the numerator in the volumetric calculation, and initially settled on a calculation that yielded a volumetric refund of $0.0008 per gallon. That amount is periodically readjusted in response to the overcharge funds the DOE collects. It is currently set at $0.0016. See Notice of Issuance of Interim Supplemental Refund Checks in the Crude Oil Overcharge Special Refund Proceeding, 60 Fed. Reg. 15,562 (1995).

As more moneys are collected, claimants automatically receive a share of the funds. If, after all refund

moneys have been collected and all potential claims have been processed, funds remain, they will be distributed to the States and the federal government as provided by *Stripper Well*. 52 Fed. Reg. at 11,740-11,741; Pet. App. 7a; see *Consolidated Edison Co.* v. *Herrington*, 752 F. Supp. 1082, 1083 (D.D.C. 1990), aff'd, 927 F.2d 1227 (Temp. Emer. Ct. App. 1991).

3. Petitioners, a group of utilities and pulp and paper companies, have filed a number of lawsuits over the past 11 years in an effort to obtain a larger share of crude oil overcharge moneys. See, *e.g.*, *Consolidated Edison Co.* v. *O'Leary*, 4 Energy Mgmt. (CCH) ¶ 26,714 (Fed. Cir. 1997); *Consolidated Edison Co.* v. *O'Leary*, 4 Energy Mgmt. (CCH) ¶ 26,693 (D.D.C. 1995); *Herrington*, 752 F. Supp. at 1085-1086; *Getty Oil Co.* v. *Department of Energy*, 865 F.2d 270 (Temp. Emer. Ct. App. 1988).

In the present case, petitioners filed two complaints in the United States District Court for the District of Columbia. The first of these sought a declaration that the DOE's 20 percent reserve fund was inadequate and illegal and that certain other parties' claims should not be paid from that fund. Pet. App. 8a & n.3. In the second complaint, petitioners challenged the allocation of $275 million the DOE recovered in an enforcement settlement with Occidental Petroleum Corporation. *Id.* at 9a. Petitioners sought to enjoin distribution of 80 percent of the Occidental funds to the States and the federal government under DOE's refund process. *Ibid.*

The district court denied the motion for a preliminary injunction and dismissed petitioners' underlying claims. The court noted that the purpose of Section 209 of the ESA—to enforce public rights and to ensure the enforcement of DOE's regulations—

differed from the purpose of Section 210, which expressly authorizes private actions to recover overcharges. Pet. App. 27a-28a. The court concluded that under this enforcement scheme petitioners had no standing to challenge the DOE's distribution of funds. *Id.* at 28a.

The Federal Circuit affirmed the dismissal of petitioners' complaint. Pet. App. 22a. The court analyzed the viability of petitioners' claims in terms of whether they had a valid cause of action. *Id.* at 13a-14a. Concerning the alleged inadequacy of the 20 percent reserve, the court held that "private claimants have no express or implied cause of action under Section 209 or under the PODRA." *Id.* at 21a. The court held that Section 209 of the ESA creates only a public enforcement right and that a private party's sole right of action under the ESA is the private enforcement remedy created by Section 210. *Id.* at 17a-18a. The court observed that petitioners' challenge to the distribution of the Occidental funds was founded on their claim that the government had settled the case for an inadequate sum. The court of appeals therefore viewed the issue as nonjusticiable because it was based on a decision that was solely "within the discretion of DOE." *Id.* at 21a.

ARGUMENT

The decision of the court of appeals is correct, and this case does not present any legal issue of continuing importance. Accordingly, review by this Court is not warranted.

1. The statutory provisions and regulations underlying petitioners' claim have no continuing force. The government's authority to regulate petroleum prices under the Emergency Petroleum Allocation

Act of 1973 (EPAA), 15 U.S.C. 751 *et seq.* (1982), expired on September 30, 1981. See Energy and Policy Conservation Act, Pub. L. No. 94-163, § 461, 89 Stat. 955, 15 U.S.C. 7605 (1982). The DOE no longer has the power to bring enforcement proceedings for past violations of the price controls, and there are no remaining administrative enforcement proceedings. Once the outstanding claims for restitution are processed, the challenged refund scheme will come to a close. As a result, the question whether the court of appeals properly interpreted the administrative and enforcement provisions of the expired Act is of no continuing significance. Petitioners offer no reason why, notwithstanding the defunct statutory provisions and finite regulatory program involved, this case presents an issue of substantial importance warranting this Court's review. See *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955); *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

2. Review of this case would implicate issues long settled by the agreement stemming from *In re Department of Energy Stripper Well Exemption Litigation*, 653 F. Supp. 108 (D. Kan. 1986), aff'd, 855 F.2d 865 (Temp. Emer. Ct. App. 1988), and Congress's enactment of the Petroleum Overcharge Distribution and Restitution Act of 1986, 15 U.S.C. 4501 *et seq.*, which provided that crude oil funds distribution resolved by the *Stripper Well* settlement would be governed by that agreement. Reopening those issues would upset the expectations of the 56 States and Territories that were parties to the settlement. Those States conduct ongoing energy programs, funded through the DOE's distribution of crude oil enforcement moneys, which provide indirect resti-

tution of overcharges suffered by the general public. Thus reopening the DOE's allocation of overcharge funds would necessarily disrupt the substantial indirect restitution programs carried out by the States.

3. Moreover, the decision of the court of appeals is correct. In examining petitioners' claims, the court properly applied the standard for determining whether a private cause of action should be found to be implied by a statute not expressly providing one, as set forth in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). See also *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 145 (1985). Under that standard, petitioners are not entitled to judicial review.

Contrary to petitioners' suggestion (Pet. 18) that courts have universally entertained review of challenges to the DOE's enforcement decisions under Section 209, such claims have consistently been rejected. It is true that courts have based those rejections on different legal theories. Some, like the district court in this case, have focused on a lack of standing. See *Payne 22, Inc.* v. *United States*, 762 F.2d 91, 93 (Temp. Emer. Ct. App. 1985); *Midwest Petroleum Co.* v. *United States Dep't of Energy*, 760 F.2d 287, 290 (Temp. Emer. Ct. App. 1985); see also *Cities Serv. Co.* v. *Department of Energy*, 715 F.2d 572, 573 (Temp. Emer. Ct. App. 1983). Others, like the court of appeals here, have analyzed the issue in terms of the lack of a cause of action. See *Consolidated Edison Co.* v. *O'Leary*, No. 97-1242, 1997 WL 763045 (Fed. Cir. Dec. 12, 1997). In challenges to administrative action, these two concepts sometimes overlap. See *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers*, 414 U.S. 453, 456 (1974). The bottom line is that courts have generally

and correctly found that private parties cannot challenge enforcement decisions under Section 209 that are not directed to the individuals bringing suit. Petitioners' case is no exception.[4]

As the court of appeals observed, the EPAA includes a comprehensive enforcement scheme, clearly divided between public and private rights. Congress expressly excluded the EPAA from the general cause of action provided by the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, 701 *et seq.* 15 U.S.C. 754 (1982); see also 12 U.S.C. 1904 note (1976). Nothing in the language or structure of the EPAA suggests any intention on the part of Congress to create a private cause of action against a government agency under Section 209. Government and private actions brought under the petroleum regulations "vindicate different rights." *Cities Serv.*, 715 F.2d at 574. The fact that private parties ultimately receive some benefit from the DOE's collection and distribution of overcharges under Section 209 does not create a cause of action under that provision. Cf . *Getty Oil Co.* v. *Department of Energy*, 865 F.2d 270, 275 (Temp. Emer. Ct. App. 1988).[5]

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[4] Furthermore, petitioners' claims are substantively meritless. The derivation of petitioners' alleged entitlement to 31-32 percent of crude oil overcharges collected (Pet. 5) is unclear. Petitioners point to nothing in the record to support that contention or to show that 20 percent of the enforcement funds eventually collected will fail to fully compensate them. Nor was there ever any promise made or right conferred to a 100 percent recovery by individuals of all their claimed overcharges.

[5] Petitioners' claim in this case is wholly statutory; they have not urged any constitutional claim.

Petitioners contend (Pet. 10, 13-14) however, that they based their action on Section 211 of the Act. But the language of that Section clearly indicates that it was intended to create jurisdiction only to hear claims the ESA would otherwise support—for instance, a challenge to an administrative order directed to the party bringing suit. See *McCulloch Gas Processing Corp.* v. *Canadian Hidrogas Resource Ltd.*, 577 F.2d 712, 713 (Temp. Emer. Ct. App.), cert. denied, 439 U.S. 831 (1978). As the court of appeals recently recognized, "nothing in section 211 purports to create a cause of action over which the district courts may exercise their section 211 jurisdiction." *Consolidated Edison Co.*, 1997 WL 763045, at *15. Petitioners provide no rationale for reading Section 211 against its plain meaning to create an independent cause of action. They cite nothing from the legislative history to suggest Section 211 was intended as anything but a straightforward grant of jurisdiction. The case on which they rely, *McCulloch*, holds only that Section 211 provides jurisdiction for courts to hear challenges to administrative orders directed to the parties bringing suit. See 577 F.2d at 717-718.[6]

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[6] In challenging the DOE's handling of the Occidental settlement, petitioners assert (Pet. 18-24) that the court of appeals' decision conflicts with that court's own earlier decision in *Mullins* v. *United States Department of Energy*, 50 F.3d 990 (Fed. Cir. 1995). Even if true, that claim would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Moreover, petitioners are incorrect. As the court of appeals explained, *Mullins* recognized that a challenge to the DOE's allocation of a settlement fund based on the inadequacy of that fund to cover claims by third

In short, the court of appeals correctly concluded that petitioners had no right to judicial review of the adequacy of the funds reserved for individual restitution claims or of the DOE's allocation of its settlement with Occidental. Petitioners have failed to show any conflict between the court of appeals' decision and this Court's precedent. Nor have they presented any issue of recurring importance warranting this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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parties "is effectively unreviewable on appeal." Pet. App. 20a (citing *Mullins*, 50 F.3d at 993).